

No. 88-5567

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

Supreme Court, U.S.

FILED

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Alexander L. Stevas, Clerk

ROBERT BRIAN WATERHOUSE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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July, 1983

QUESTIONS PRESENTED

1. Whether petitioner's pre-trial statements to police officers were obtained in violation of his right to counsel under the Fifth and Fourteenth Amendments to the United States Constitution, after petitioner had requested counsel and particularly after counsel had been appointed?

2. Whether petitioner's pre-trial statements made after counsel had been appointed to police officers who knowingly failed to advise petitioner's attorney that they were interrogating petitioner?

3. Whether petitioner's pre-trial statements to police officers and tangible evidence taken from petitioner's automobile were obtained in violation of his rights under the Fourth and Fourteenth Amendments to the U.S. Constitution, when they were the result of an illegal arrest or detention by the police without probable cause?

4. Whether tangible evidence taken from petitioner's automobile pursuant to a search warrant were obtained by police officers a result of an illegal seizure of the car without probable cause prior to the issuance of the search warrant, thereby violating petitioner's rights under the Fourth and Fourteenth Amendments to the U.S. Constitution?

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner Robert Brian Waterhouse prays that a writ of certiorari issue to review the decision of the Supreme Court of the State of Florida in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Florida affirming petitioner's conviction of first degree murder and sentence of death, which is reported in Waterhouse v. State, 429 So.2d 301 (Fla. 1983), appears at Appendix A, pp. 1a-11a. The trial court's orders denying petitioner's motions to suppress evidence, its judgment, and its sentencing determination and finding of facts on sentencing are unreported and appear at Appendix B, pp. 1b-6b.

JURISDICTION

The Supreme Court of Florida issued its opinion and judgment in this case on February 17, 1983. (App. A, p. 1a.) On April 27, 1983, the Supreme Court of Florida by written order denied petitioner's timely motion for rehearing and affirmed the conviction and penalty, which appear at Appendix C. Petitioner filed a timely application on June 16, 1983, for an extension of time in which to file a petition for writ of certiorari, and Justice Powell on June 17, 1983, ordered that the time for filing this petition be extended to and including July 26, 1983. Robert B. Waterhouse v. Florida, No. A-1008 (June 17, 1983).

The jurisdiction of the Court rests upon 28 U.S.C. § 1257(3), the petitioner having asserted below, and is asserting here, a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, which provides in pertinent part:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches, and seizures, shall not be violated . . ."

the Fifth Amendment to the Constitution of the United States, which provides in pertinent part:

"[N]or shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law . . ."

and the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

"[N]or shall any State deprive any person of life, liberty or property without due process of law . . ."

STATEMENT OF THE CASE

1. Introduction.

On January 3, 1980, the nude body of a woman was discovered on the shore of Tampa Bay in St. Petersburg, Florida. On January 31, 1980, the Pinellas County Grand Jury met and returned an indictment charging petitioner with the premeditated murder of one Deborah Kammerer by drowning after having beaten and choked her. (R.16, 17.)^{1/}

Prior to trial counsel for the petitioner made a variety of challenges to the constitutionality and constitutional applicability of the Florida capital punishment laws but each of these arguments was rejected by the trial court judge. Counsel for petitioner also moved to suppress certain items of tangible evidence recovered from petitioner's automobile on or after January 7, 1980, as well as a series of statements made by petitioner to officers of the St. Petersburg Police Department on January 7, 9, and 10. After a separate evidentiary hearing and rehearing, the trial judge on August 25, 1980, entered an order denying all of the motions. (R.371.) The statements and tangible items were presented at trial over counsel's objections. The Florida Supreme Court affirmed the denials on appeal. (App. A.)

On September 2, 1980, a jury of the Pinellas County Circuit Court, found petitioner, Robert Brian Waterhouse,

^{1/} Numbers preceded by "R." refer to pages in the record on appeal to the Supreme Court of Florida.

guilty as charged. (R.389.) After a separate penalty trial, the trial judge accepting the same jury's recommendation of death, sentenced petitioner to die in the electric chair. (App. B, R.2305.) On September 9, 1980, petitioner moved for a new trial on grounds that included the trial court's errors in denying petitioner's motions to suppress, tendered contrary to the Fourth, Fifth, Sixth, and Fourteenth Amendments. (R.406.) The motion for a new trial was denied. (R.413-414.) On September 15, 1980, the Court entered written findings of fact in support of the sentence. (App. B.) On February 17, 1983, the Supreme Court of Florida affirmed the conviction and sentence and on April 27, 1983, denied a motion for rehearing. (App. C.)

2. The Motions to Suppress.

In the trial, the State's case on the guilt of petitioner and the requested death penalty centered on a series of self-incriminating statements alleged to have been made by petitioner to police officers without presence of counsel both before and after his arrest on January 7, 9, and 10, and on items of tangible evidence including blood, hair, and fiber samples obtained from petitioner's car after it had been seized by the police and later searched pursuant to a warrant obtained after the seizure. These statements and items of tangible evidence were the subject of defense counsel's motions to suppress on the grounds (1) that the statements were (i) either made without the presence of counsel after counsel had been requested (some made even after counsel had been appointed), (ii) or were obtained as the result of an illegal arrest or detention, and (2) that the tangible evidence was obtained as the result of either

an illegal arrest or detention or a seizure of petitioner's automobile without probable cause. These issues were raised in petitioner's brief to the Florida Supreme Court. (App. A, pp. 4a-5a.)

At the evidentiary hearing held on August 22, 1980 (R.435-581), Sergeant Gail Murry, who was in charge of the homicide investigation, testified concerning the events leading to the search of petitioner's automobile and the interrogations of petitioner by the police. According to her testimony, on the morning of January 3, 1980, she responded to a call concerning the discovery of a body near the shoreline in the Lassing Park area of St. Petersburg. (R.445.) When she arrived at the scene she found the nude body of a white female laying face down in the mud, approximately 20 feet from the high tide mark. (R.445.) The victim had suffered severe lacerations to the head and scalp area, numerous bruises around the throat, and a swollen and blackened right eye. (R.445.) A tampon had been shoved in the victim's mouth, and it was later determined that she was having a menstrual period at the time of death. (R.445.) Examination of the general area around where the body was discovered indicated to Sergeant Murry and other officers at the scene that the assault had occurred elsewhere and that the body had been dragged into the water after being transported there. (R.446.) No tire tracks were found, but the grassy area of the park did not hold tire marks, as was demonstrated by police cars which were driven on it. (R.446.)

On January 5, 1980, the St. Petersburg Police Department received an anonymous phone call from a male with a New England or New York accent who said "In reference to

the bay murder, I have a license number for you - GMU603. All the information is right there." The caller then hung up. (R.448.) This conversation was taped. The license tag number was determined to belong to a 1973 Plymouth registered in the name of petitioner, Robert Brian Waterhouse, residing at 1675 Pinellas Point Drive South. (R.448.)

A check of police records disclosed that petitioner was on lifetime parole for the murder of a 77-year old white female in New York State. (R.449.) Sergeant Murry testified that upon further investigation she learned that the victim had been beaten and choked to death and left nude. (R.449.) As a result of this information, the St. Petersburg Police Department initiated a surveillance of the residence and person of petitioner. (R.450.)

On January 7, 1980, the police learned the identity of the victim from her neighbors' missing person's report. (R.450.) The victim was one Deborah Kammerer. She was last seen by her friends, Yohan Wenz and Carol Byers, at the ABC Lounge on Fourth Street of St. Petersburg on the evening of January 2, 1980. (R.451.) Her friends informed police that they had accompanied her to the lounge that night but had left her there shortly before midnight. (R.451.) Kyoe Ginn, a bartender at the ABC Lounge, identified a photograph of Deborah Kammerer and indicated that she was a frequent patron of the lounge. (R.452.) The bartender also informed the officers that the victim had been in the bar on the evening of January 2, 1980, and had left with a man shortly after midnight. (R.452.) She identified petitioner from a group of photographs and stated that he was the man who had left the lounge with the victim on the evening of

January 2, 1980. (R.452.) She indicated petitioner also was a frequent patron of the lounge and well-known to her. (R.452.)

Sergeant Murry testified concerning her interview with Mr. and Mrs. Foster, petitioner's aunt and uncle, and a friend of the family, Mr. Norwood, all of whom resided at the Pinellas Street address. (R.453.) Sergeant Murry stated that the three interviewees had New England or New York accents similar to that she had heard on the tape of the anonymous phone call. (R.453.)

On the basis of the above information, Sergeant Murry and other officers decided to try to persuade petitioner to come to the police station voluntarily for questioning about the case, but not to arrest him. (R.455, 486.) Detectives Leake and Stellges were assigned to surveillance of petitioner on the evening of January 7, 1980. The detectives followed petitioner's car from the ABC Liquor Lounge to Club 28. After petitioner had gone into Club 28, come out, and gotten back into his car, Detective Leake directed a marked police car to pull petitioner over to the side of the road. (R.528, 533.)

Petitioner, who was called as a witness on his own behalf during this evidentiary hearing, testified that the marked police car that stopped him had its flashing lights on and that three or four other marked and unmarked police cars immediately pulled up around him. (R.540.) Detective Leake's testimony also indicated that there were additional police cars in the area. (R.533.)

According to Detective Leake, Detective Stellges identified himself as a police officer, asked petitioner for

his driver's license, which petitioner then produced, and told petitioner that the detectives were investigating a homicide and would like him to come to the police station to talk. (R.529.) According to the detective's testimony, petitioner was told that it was very important that he come to the station, but that he did not have to come if he did not want to. (R.529-530.) Petitioner went to the station driving alone in his own car and following Detective Stellges' car. (R.530.) Detective Leake followed petitioner in another police car. (R.530.) On cross examination, Detective Leake stated that there were two unmarked police cars following petitioner's car which was preceded by the marked police car in which Detective Stellges was then driving. (R.534.)

Petitioner testified that the only reason he followed the officers to the police station and did not refuse to go there was that the police had his license and refused to return it. (R.540.) When petitioner asked the police why he could not have his license back if he was not "under arrest or - - - didn't do anything wrong," Detective Stellges, according to petitioner, said, "Well, you will have to go to the police station to get it back." (R.540.) In addition, petitioner testified that he was escorted to the police station by at least four police cars and that one of them drove alongside him at least part of the way, thereby boxing him in. (R.540.) Petitioner also stated that he felt that the police could have pulled him over for driving without a license, a crime in the State of Florida, if he had not accompanied them to the station to retrieve his license. (R.540.)

At the evidentiary hearing, Detective Stelljes admitted taking the license, but added that petitioner never asked for it back. (R.562.) Other than petitioner's testimony, there was no testimony presented as to when or whether Detective Stelljes or other officers returned the license. Detective Leake who was with Detective Stelljes at the scene of the original stop testified that he did not observe Detective Stelljes or any other officer return the license then or later. (R.533.)

When petitioner arrived at the police station at 10 p.m. on the night of January 7, 1980, accompanied by his escort of police cars, he parked his car in a public parking space outside the station. (R.462, 530.) It was placed under guard. (R.462.) Upon entering the police station, petitioner was advised of his rights by Sergeant Murry and he signed a form waiving his rights. (R.456, 459.) Petitioner was then taken to Sergeant Murry's office on the second floor. (R.1813.) He reportedly was informed that he was not under arrest and that he was free to go at any time. (R.460-461.) Petitioner was then questioned by the two officers for some 45 minutes to an hour. (R.548, 1856.) During this interview, petitioner denied committing the murder and denied that he knew a Debbie or Debbie Kammerer. (R.1842.) He admitted that he had been at the ABC Lounge on January 2, 1980, denied that he had left with a girl, and stated that no one else had used his car for the last two weeks. (R.1843.) At the end of the interview, petitioner asked once again whether he was free to leave and upon the officer's response that he was, he did so. (R.461, 557.) Petitioner, however, was not permitted to take his car with him; instead the police towed it into a basement parking lot

under the police station for safeguarding. (R.462, 513, 542.) According to petitioner, he received the driver's license back only when he was departing. (R.558, 560.)

During the time petitioner was inside the police station, Detective John W. Long conducted a visual inspection of petitioner's 1973 Plymouth reportedly from the outside through an open window with a flashlight. (R.462, 511.) Detective Long testified that he observed sand on the floor in front of the driver's seat and what appeared to be two dark stains directly behind the driver's seat. (R.512.) Based upon Detective Long's observations and other information, the police obtained a warrant to search the vehicle at 5 a.m. on January 8, 1980, and a search was conducted shortly after. (R.513-514.)

The search of the automobile disclosed blood stains analyzed as type A, the same blood type as that of the victim. (R.466-467.) Based on this information and the other information described above, at 5 p.m. on January 8, 1980, the police obtained a warrant for the arrest of petitioner. (R.466.)

Petitioner was arrested by Sergeant Murry and Detective Hitchcox on the next day, January 9, 1980. (R.467.) During the ride back to the police station, Sergeant Murry advised petitioner of his rights from a Miranda card, including the right to remain silent and the right to counsel. (R.469-470.) Sergeant Murry then asked, "Having these rights in mind, do you wish to talk with us now." Petitioner did not respond. (R.470.) After a few minutes, Detective Hitchcox showed petitioner a picture of Debbie Kammerer and asked if he knew her. (R.470, 1845.) Petitioner reportedly said, "Yes, that's Debbie." In response

to Sergeant Murry's statement -- "Oh, well, then you do know her" -- petitioner reportedly indicated that he did. (R.471, 1846.) Sergeant Murry also testified that Detective Hitchcox said to petitioner, "We were right, weren't we, about what happened Wednesday night [the night of the murder]," referring to the interview at the police station on the previous night.^{2/} (R.471.) Petitioner reportedly replied, "Might." (R.471.)

At some point, while still in the car, petitioner said to the officers, "I think I want to talk to an attorney before I say anything else." (R.471.) During the booking that afternoon, the officers told petitioner that they would come up to the fourth floor later and give him the opportunity to talk with them and answer any questions he might have. (R.472.) Sergeant Murry testified that petitioner was cooperative and that it was her impression he would be interested, although she could remember no statement to that effect. (R.472-473.)

According to Sergeant Murry, at 2 or 2:30 p.m. in the afternoon of January 9, 1980, Detective Hitchcox and she commenced their interrogation of petitioner in a small padded interrogation room with no windows.^{3/} (R.473, 1858-1862.) Sergeant Murry testified that petitioner seemed "rather sad and down" as frequently happens when people have

^{2/} At trial, Sergeant Murry, but not Detective Hitchcox, testified that the latter's question was, "We were correct, weren't we, in stating you were involved in this case?" (R.1817.)

^{3/} At one point in the evidentiary hearing, Sergeant Murry indicated that this interview took place at 2 a.m. in the morning, presumably of January 10, 1980 (R.473), but later she indicated it was on Wednesday afternoon. (R.475.) The latter seems to be the correct time, since the interrogation took place during the same afternoon as the booking. (R.475.) Petitioner was booked at 1:20 p.m. on the 9th of January. (R.8.) The error about the time of this interrogation continued through to the decision of the Florida Supreme Court.

been arrested. (R.473.) Petitioner refused to listen to another reading of his rights from the Miranda form. Petitioner was upset and crying that his life was over and he was going to the electric chair. (R.473, 1858.) He refused to sign the blank waiver form, similar to the one that he had signed previously. (R.474, 475.) He reportedly stated that he did not want his rights. (R.473.) Sergeant Murry testified that at another point petitioner stated, "I want to talk to you but I don't want my rights." (R.474.) In response to which, Sergeant Murry tried to explain to him that the rights were his and that by law the officers had to advise him concerning them. (R.473.) Sergeant Murry testified that petitioner responded affirmatively to her question as to whether he understood what he said would be repeated in court. (R.475.) However, petitioner reportedly also made statements that the officers should tell it to the court as people not as police officers. (R.474.)

The officers then proceeded to question petitioner for four hours. (R.476, 1850.) During the interrogation, petitioner would become very upset and would start crying. Sergeant Murry testified that the officers would then stop questioning him until he recovered. (R.1850.) The interrogation finally terminated when, after another bout of crying, petitioner said, "You know, I really am tired. I think I'd like to talk to my lawyer. Would you all come back later tomorrow?" (R.477.) Sergeant Murry gave a second version of petitioner's statement as, "Will you come back tomorrow? I'm kind of tired and I think I want to talk to my attorney." (R.477.)

During the interrogation on the afternoon of the 9th of January, 1980, petitioner made various statements to the officers that were later admitted into evidence over the objection of defense counsel. (R.506, 1847-1849.) He stated that nothing would bring "her" back, in apparent reference to the victim. He talked about wanting to live a normal life and repeated that his life was now over. (R.506, 1847.) He stated that he had a problem in that he really liked sex, that he had a drinking problem, that when drinking he tended to have a problem with violence, and that he found himself doing things over which he had no control. (R.507, 1848.)

On the morning of January 10, 1980, petitioner first went to an advisory hearing at which he was advised of the complaint against him and a Public Defender was appointed to represent him. Then around noon he was interviewed for several hours by a representative from the Public Defenders' Office. (R.478, 490.) Later that afternoon, Sergeant Murry and Detective Hitchcox conducted the final interrogation of petitioner, but without advising anyone in the Public Defenders' Office that their client was being interrogated. (R.499-500.) Sergeant Murry admitted on cross examination that the interrogating officers were aware that the Public Defenders' Office had been appointed as counsel and that petitioner had been interviewed by a representative of that office. (R.500.)

During the afternoon interrogation on January 10, 1980, the officers reportedly were told again by petitioner that he did want his rights read but he would not sign the written waiver form, that he wanted to talk to the officers.

as people, and that he did not want to confess but "wanted to tell [the officers] about it." (R.479.) When trying to explain to petitioner his rights, Sergeant Murry told him that she did not really know "if what [he] was going to say [could] be used in court." (R.479.) As on the previous afternoon, petitioner is described as having become "very upset." Petitioner also was extremely "paranoid" and expressed fears that the officers were going to try to frame him. (R.481.) He reportedly would break off talking to cry and then start talking again, just as he did in the interrogation on January 9. (R.481.)

After two or three hours of questioning, the interrogation terminated with petitioner again telling the officers that he was tired and confused and that he did not want to talk anymore but wanted them to come back. (R.481.) The officers did not return because petitioner's appointed counsel directly advised the officers that they could not conduct any further interrogations of his client. (R.481, 502.)

On cross examination, Sergeant Murry admitted that petitioner had advised the officers that he did not want to confess and that he did not want to talk about Wednesday, and also that petitioner was more paranoid and illogical than at the previous interrogation. (R.501-503.)

In the interrogation on January 10, 1980, petitioner is alleged to have made additional damaging statements, which were admitted into testimony over counsel's objections. (R.506, 1850-8.) He also indicated that he liked sex any way he could get it, anal, oral, or vaginal. (R.1850.) He said he had no problem with girls and never

wanted to commit rape. (R.1851.) He said that sometimes he would become sexually aroused and that if he found out that the girl was "cursed", this would frustrate him. (R.1851.) When the officers asked when this problem had occurred, he reportedly told them that it had occurred Wednesday night, which the officers took to be a reference to the night of the murder. (R.1851.) He is alleged to have stated that he would sometimes "flip out" and do terrible things. (R.1853.) He further indicated that he had stopped drinking since Wednesday night, when he had drunk a lot. (R.1853.) And, according to Sergeant Murry's testimony, petitioner in discussing that Wednesday night and his problems, stated, "Well, nobody wants to go to jail and you do what you have to do to protect Bobby Waterhouse." (R.1825-1826, 1854.)

At the close of the evidentiary hearing, the trial judge denied defense counsel's motions to suppress, except for the last statements made in custody during the afternoon interrogation on January 10 after the Public Defenders' Office had been appointed petitioner's counsel. (R.579.) The trial judge found that petitioner's failure to reexecute the Miranda waiver on that occasion meant there was no waiver of his right to have his appointed counsel present. (R.579.) As to the remaining issues, the trial judge found that petitioner had gone to the police station on the night of January 7 voluntarily and had been interviewed voluntarily. (R.580.) The judge also found that all other statements made by petitioner were made freely and voluntarily and after he had been fully advised of all rights to which he was entitled. (R.580.)

3. The Trial.

On the morning of January 3, 1980, Glenn Shine was walking his dog along the waterfront and noticed an apparently lifeless naked body lying face down on the mud flats. (R.903, 906.) Another nearby resident made a phone call to the police. (R.907.)

Officers from the St. Petersburg Police Department arrived at the scene, determined that the body was dead, and proceeded to secure the area and examine it for evidence. (R.913-937.) Woman's clothing belonging to the victim was discovered scattered over a wide area near the murder scene. (R.929, 949.) Marks indicating that something had been dragged were found in the sand near the high tide mark. (R.953.) Abrasions were found on the body indicating that it had been dragged feet first. (R.953.)

Testimony by the Deputy Chief Medical Examiner for Pinellas County indicated that the victim had died as a result of drowning at some time between 3:45 and 7:45 a.m. on the morning of January 3, 1980. (R.1035.) The victim had suffered numerous bruises and lacerations prior to the time of death by drowning. (R.1036.) There was no indication of vaginal penetration but there was evidence indicative of anal penetration. (R.1037.) In addition, injuries found in the area of the victim's rectum suggested the insertion of some blunt object other than a male penis. (R.1039.) In response to a hypothetical of the prosecutor, the examiner stated that the injury could have been caused by, among other things, the insertion of an object the size of a Coke bottle. (R.1039-1040.)

The victim's blood was type A. (R.1040.) Examination of the rectum revealed the presence of enzymes that might have come not only from type A but also type B blood, even though the expert testifying admitted the source of the enzymes indicating type B blood could have been something other than blood. (R.1042.) There was expert testimony that the injury to the rectum occurred prior to death and that frothy water found in the lungs of the victim indicated that she was alive but unconscious when she was dragged into the water. (R.1056-1060.)

Kyoe Ginn, the bartender at the ABC Lounge, testified that both the victim and petitioner were regular customers of the lounge. (R.1114, 1116.) On the evening of January 2, 1980, the bartender saw the two together in the bar after the victim's friends had left. (R.1119.) Approximately one half hour later the bartender observed the victim and petitioner leaving the lounge together. (R.1120.)

Petitioner's supervisor at work, Mr. Van Vuren, testified that when petitioner came to work on the morning of January 3, 1980, he asked to have the day off because he was feeling "rough." (R.1138, 1140.) Petitioner had red marks on each side of his face. (R.1140.) When the supervisor saw petitioner again on January 7, 1980, he observed makeup on petitioner's face, and there were new front seatcovers in petitioner's 1973 Plymouth. (R.1143.) Petitioner's supervisor also testified, over objections of defense counsel, that petitioner had told him that he liked anal sex and slapping women when performing that act. (R.1157, 1158.) Petitioner's girlfriend of three months testified that petitioner had stated a preference for anal intercourse and had engaged in it with her on more than one

occasion. (R.1319.) A boyfriend of the victim testified that the victim intensely disliked anal intercourse.

(R.1271.)

Mrs. Foster, the aunt of petitioner, was unable to indicate his whereabouts during the early morning of January 3. (R.1248.) She testified that petitioner had stayed home from work on Thursday, January 3, because he was not feeling well. (R.1249.) She did not observe any bruises on his face. (R.1254.) On the afternoon of January 3, she saw petitioner washing the outside of his car. (R.1251.) The testimony about washing the car was corroborated by Mr. Norwood, the family friend who lived in the same house, who added that he might have been cleaning the inside also. (R.1259.)

A crime scene technician identified items of evidence, including blood, hair and fiber samples, taken from petitioner's car. (R.1322.) The technician was permitted to testify, over the objections of counsel for petitioner, that ten baggies of marijuana had been found in the glove compartment. (R.1365.) Other expert testimony indicated that the enzymes of the type A blood found in petitioner's car was similar to that of the victim, not of the petitioner (R.1460-1502), that blood had been cleaned off or wiped off a leather jacket belonging to the petitioner and various parts of the interior of his automobile (R.1544), and that the location of splattered blood stains in the automobile indicated that the victim had been struck with great force with a hard object while in the right front passenger's seat of the vehicle. (R.1579, 1616, 1620.) In addition, hair samples from petitioner's car were found

in the victim's coat and pants, discovered at the scene of the crime. (R.1720-1721.)

An inmate who shared a cell with petitioner prior to petitioner's trial was permitted to testify, over defense counsel's objections, to a statement by petitioner that "I wonder how he would like a Coke bottle up his ass like I gave her." (R.1794.) The inmate was permitted to describe the circumstances under which the statement was made over the objections of defense counsel. Petitioner allegedly was frustrated in a homosexual attack on a new cellmate when he made the statement. (R.1794.)

Sergeant Murry and Detective Hitchcox testified as to petitioner's pretrial statements discussed above at pages 14 and 15. (R.1836-1888.)

A bouncer at the ABC Lounge on the evening of January 2, 1980, testified for the defense that another man had been sexually harassing the victim on that night, that petitioner had left the bar alone, and that the police had refused to follow up on those leads. (R.1931-1949.)

The trial jury found petitioner guilty of murder in the first degree on September 2, 1980. (R.389.)

4. The Sentencing Trial.

At the sentencing trial, petitioner's previous conviction for second degree murder in New York was introduced, and an Officer Hawes, retired from the Long Island Police Department, testified as to the circumstances of that case, over the objections of defense counsel. Only one witness appeared on behalf of petitioner, his aunt Mrs. Foster. (R.2257.)

A majority of the jury advised and recommended that the Court impose the death penalty on the defendant.

(R.2307). The trial judge then sentenced petitioner to death in the electric chair. (R.2305.)

On September 15, 1980, the trial judge filed an order with findings of fact supporting the death penalty. (Appendix B.) The trial judge found the following aggravating circumstances: the previous conviction in New York for murder in the second degree and life-time parole at the time of the murder; the previous conviction in New York involving the use or threat of violence; the murder while engaged in the commission of a rape, a life felony; the murder committed for the purpose of avoiding or preventing a lawful arrest by eliminating the victim as a witness to the rape; and the nature of the murder designed to inflict a high degree of pain upon the victim. (App. B.) The trial judge found no mitigating circumstances. (App. B.)

REASONS FOR GRANTING THE WRIT

This case raises basically four important questions under the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution. The first is what constituted a request for counsel and a waiver of that request by the petitioner when he was in custody that would permit the police to continue questioning that person. The second is whether the police should have continued to interrogate petitioner after counsel had been appointed. The third is whether seizure of petitioner's driver's license and the presence of a police escort negated the voluntariness of petitioner's going to a police station, thereby requiring the exclusion of statements made there and tangible evidence taken from petitioner's car which was seized as a result of the trip to the station. The fourth is whether there was

probable cause to impound petitioner's car before a search warrant had been obtained.

In reaching its decision affirming the trial court's conviction and sentence, the Florida Supreme Court misconstrues several decisions of this Court upon which it expressly relies and others which should have been applied. The importance of these issues -- vindication of constitutionally guaranteed rights that protect individuals from improper treatment by officers of the law and that go to the heart of our adversarial legal system -- make them particularly appropriate for resolution by this Court.

ONE

PETITIONER'S PRE-TRIAL STATEMENTS TO
THE POLICE WERE OBTAINED IN VIOLATION OF
PETITIONER'S RIGHT TO COUNSEL UNDER THE
FIFTH AND FOURTEENTH AMENDMENTS TO
THE UNITED STATES CONSTITUTION

The decision of the Florida Supreme Court would permit police officers deliberately to ignore petitioner's reiterated requests to speak to counsel before being subjected to additional interrogation -- a basic right guaranteed by the Fifth and Fourteenth Amendments and repeatedly upheld by the opinions of this Court. Miranda v. Arizona, 384 U.S. 436 (1966) and Edwards v. Arizona, 451 U.S. 477 (1981).^{4/} It would permit them to circumvent such requests by initiating further communications in a custodial setting

^{4/} The right to counsel during custodial interrogation is well settled. In Miranda, this Court directed that "[i]f an individual states that he wants an attorney, the interrogation must cease until an attorney is present." At 474. Later cases by this Court have emphasized the strict character of the prohibition protecting an individual's right to counsel. For example, in Fare v. Michael C., 442 U.S. 707, 719 (1979), the Court referred to Miranda's "rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease."

in order to elicit statements that they can construe as waivers, even though not intended as waivers by petitioner, with the ultimate purpose of eliciting incriminating statements in violation of the Fifth Amendment.

In affirming the trial court's refusal to suppress certain potentially incriminating statements made by petitioner after petitioner had indicated a desire to have counsel present, the Supreme Court of Florida seriously misconstrued the opinions of this Court in both Miranda and Edwards.

In Miranda, this Court stated that if during a custodial interrogation an individual "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." 384 U.S. at 444-45 (emphasis supplied). Other decisions have defined the scope of "in any manner." For example, in Stumes v. Solem, 671 F.2d 1150, 1153 (8th Cir. 1982), cert. granted, 51 U.S.L.W. 3938 (July 6, 1983) (No. 81-2149), the Eighth Circuit employed Miranda to exclude information obtained from questioning after defendant said: "I would rather not talk about it . . . until I talk to my attorney," and in White v. Finkbeiner, 611 F.2d 186, 189-90 (7th Cir. 1979), vacated and remanded on other grounds, 451 U.S. 1013 (1981), the Seventh Circuit held that, although equivocal, the phrase "I'd rather see an attorney," constituted a sufficient request for counsel. See also Maglio v. Jago, 580 F.2d 202, 205 (6th Cir. 1978) ("Maybe I should have an attorney" considered a request for a lawyer); United States v. Clark, 499 F.2d 802, 805 (4th Cir. 1974) ("I had better talk to a lawyer" considered a request for a lawyer).

According to the testimony of the police, petitioner's statements requesting counsel were: (1) "I think I want to talk to my lawyer before I say anything else" (in the police car on the way to the station) (R.471); and (2) "You know, I really am tired. I think I'd like to talk to my lawyer. Would you all come back later tomorrow?" (at the end of the January 10 early morning interrogation). (R.477.)^{5/} When compared with the requests for counsel approved in the cases cited above, petitioner's statements clearly indicate his desire to have counsel. However, the Supreme Court of Florida, in spite of the settled interpretation of what constitutes a request for counsel protected by the Fifth Amendment, found that petitioner's statements that "he thought" he should talk to an attorney were at most "equivocal requests to consult with counsel." (App. A, p. 7a.)

The Florida Supreme Court not only mischaracterized petitioner's requests for counsel, but it ignored other indications that throughout these interrogations petitioner desired not to speak about the crime with which he was being charged nor to confess, even when he was willing to speak about other matters. For example, after petitioner's rights were read to him in the police car, petitioner did not respond to Sergeant Murry's question as to whether he wished to talk, "having these rights in mind." (R.470.) After his arrest on January 9, petitioner consistently refused to sign the waiver cards proffered to him, even though he had

^{5/} Sergeant Murry's testimony gave two versions of petitioner's request made at the end of the early morning interrogation on July 10. The second version was: "Will you come back tomorrow? I'm kind of tired and I think I want to talk to my attorney." (R.477.)

previously signed one before his arrest. (R.474-5, 479-80.) He also stated frequently that he wanted to talk to Sergeant Murry and Detective Hitchcox as people not police officers. (R.474, 479.)

Of course, even if petitioner's requests were "equivocal," they were still valid, since "under Miranda a request for an attorney need not be clear and unequivocal." United States Ex Rel. Riley v. Franzen, 653 F.2d 1153, 1159 (7th Cir. 1981) (citation omitted). An "equivocal" request has been held to permit the police to communicate further with petitioner while he was in custody, but only in a very circumscribed fashion, as was realized by the Florida Supreme Court in this instance, citing Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979); and Nash v. Estelle, 597 F.2d 513, 517 (5th Cir.), cert. denied, 444 U.S. 981 (1979). (App. A, p. 7a.) However, any questions or other communications by officers are strictly limited to ones intended merely to clarify the equivocal request for counsel, not to elicit other information. Nash, 597 F.2d at 517.

The Florida Supreme Court went on to distinguish Edwards erroneously on the grounds that petitioner never explicitly stated that he did not want to talk to the police nor was he told by the police that he had to talk to them. (App. A, p. 7a.) On the basis of this finding the Supreme Court of Florida held that the police did not act improperly in visiting petitioner and questioning him further after his two "equivocal statements" expressing possible interest in seeing an attorney. (App. A, p. 7a.) This case should not be distinguished on these grounds, since petitioner did indicate that he did not want to talk to Sergeant Murry and

Detective Hitchcox as officers and being held in an interrogation room and being asked questions should not require that the police also explicitly state that petitioner had to talk to them.

The Florida Supreme Court also failed to properly apply the standards set by this Court in Edwards for determining whether petitioner waived his Fifth Amendment right to counsel. In Edwards, this Court strengthened the protections afforded by Miranda by requiring the additional safeguard that a valid waiver cannot be demonstrated where the suspect has not initiated the conversation, even if he has been advised again of his rights. 451 U.S. at 484-485.^{6/} Under Edwards, if "the right to counsel [is] invoked, the accused must both initiate the subsequent communication and validly waive the right to counsel for the statement to be admissible." McCree v. Housewright, 689 F.2d 797, 802 n.8 (8th Cir. 1982). Accord Oregon v. Bradshaw, 51 U.S.L.W. 4940, 4941 (No. 81-1857) (U.S. June 23, 1983); Fields v. Wyrick, 682 F.2d 154, 159 (8th Cir.), rev'd on other grounds, sub nom. Wyrick v. Fields, 103 S. Ct. 394, __ U.S. __ (1982). Thus, to initiate a conversation that would permit the Florida

6/ This Court held that:

[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. [A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

451 U.S. at 484-85.

Supreme Court to find a valid waiver, petitioner would have had to show that he wanted to waive his right to counsel. "Initiation" by a suspect in custody has required that the suspect actively seek out the conversation. See, e.g., McCree, supra, (interrogation initiated by suspect knocking on cell door and saying to police officer that he wanted to make a statement).^{7/}

The officers initiated both of the interrogations on January 9 and 10, by having petitioner taken from his cell to the interrogation room. Each followed closely upon a request by petitioner to speak to his lawyer. Petitioner was in custody. In the interrogation room on the fourth floor of the jail, he was subjected to further questioning. In the case of the first interrogation, petitioner's supposed invitation consisted of an "indication of interest" in, not an explicit invitation to, the officers telling him about the next steps in the case. Moreover, Sergeant Murry testified that it was only her impression that petitioner was interested in hearing about the next steps; she could not recall any explicit request. (R.496-497.) And, the officers spoke to petitioner of coming to see him only to talk not to question. (R.497.) The second interrogation was preceded by a request that the officers return when petitioner was less tired and after he had seen and talked to a

^{7/} See also, *United States v. Gordon*, 655 F.2d 478 (2d Cir. 1981) (suspect expressed a desire to inform on another person who should have been arrested); *State v. Brezee*, 66 Haw. 163, 657 P.2d 1044 (1983) (defendant against advice of counsel invited officer to cell and declared he did not want an attorney); *Payne v. State*, 424 So.2d 722 (Ala. Crim. App. 1982) (defendant asked to meet with police); *People v. Thomas*, 98 Ill. App. 3d 852, 424 N.E.2d 985 (1982), cert. denied, ___ U.S. ___ (1982) (defendant inquired about an accomplice's statements about defendant's involvement in the crime); and *State v. Pittman*, 210 Neb. 117, 313 N.W.2d 252 (1981) (defendant told police he was being framed by co-defendants).

lawyer. (R.477.) Thus, under the circumstances, neither interrogation can be considered "initiated" by petitioner. And, where the suspect in custody did not initiate the questioning, there can be no waiver under Edwards.^{8/}

This Court's most recent decision on the Edwards rule, Oregon v. Bradshaw, resulted in a plurality decision in which eight of the nine justices arguably hold that Edwards announced a per se, prophylactic rule. 51 U.S.L.W. at 4941; see also 51 U.S.L.W. at 4944 n.2 (Marshall, J., dissenting). Nevertheless, Justice Powell in his concurring opinion pointed out the continued confusion in the lower courts as to whether the Edwards rule was per se rule. 51 U.S.L.W. at 4942. Petitioner's case, which reveals the dangers inherent in a lower court's failure to use Edwards' per se rule -- namely court affirmation of police attempts at circumventing a suspect's Fifth Amendment right to counsel -- would be a proper vehicle to resolve the confusion of which Justice Powell wrote.

In addition, Oregon v. Bradshaw revealed a second area in which the further guidance of this Court is needed. The plurality and the dissent differed on the meaning of "initiation." The plurality was satisfied with a more general conversation about the investigation, perhaps more than what is required by the custodial relationship. 51 U.S.L.W. at 4941. The dissent wished to require that the conversation initiated be more strictly about the subject matter of the investigation. 51 U.S.L.W. at 4944. A resolution of this constitutional issue by this Court would

8/ This case is stronger than White v. Finkbeiner, 687 F.2d 886 (7th Cir. 1982), petition for cert. filed, 51 U.S.L.W. 3001 (U.S. June 18, 1982) (No. 81-2340), where the court excluded statements made following police-initiated questioning two days after defendant had indicated a disinterest in talking to police and had said: "I'd rather see an attorney." Id. at 887.

serve to vindicate the rights of petitioner -- which rights have been denied by the Florida Supreme Court decision -- and would send a clear signal to police that they must abide by the Edwards rule and not initiate communications or set up designed to elicit self-incriminating statements in the absence of counsel once counsel has requested.

The second Edwards test requires that petitioner must knowingly and "validly waive the right to counsel for [a] statement to be admissible." McCree, 689 F.2d at 802 n.8. This Court has long held that "courts [will] indulge in every reasonable presumption against waiver," Brewer v. Williams, 403 U.S. 387, 404, rehearing denied, 431 U.S. 925 (1977) (mem.),^{9/} and that this presumption can be overcome only by proof of "an intentional relinquishment or abandonment" of that right. Id., quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938). This Court very recently held that where reinterrogation follows a suspect's request for counsel "the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during interrogation." Oregon v. Bradshaw, 51 U.S.L.W. at 4941. Furthermore, pursuant to Edwards, such an abandonment must be voluntary, knowing, and intelligent. 451 U.S. at 482.

In the instant case, although the State did not sustain the burden of demonstrating petitioner's voluntary, knowing, and intelligent abandonment of his right to counsel, the Florida Supreme Court still found that petitioner's statements were voluntary and that he had waived his right to counsel.

^{9/} This presumption had previously been stated in Brookhart v. Janis, 384 U.S. 1, 4 (1965), and Glasser v. United States, 315 U.S. 60, 70 (1941).

In cases where it has been held that suspects waived their right to counsel, the waivers have been explicit. In Wyrick v. Fields, 103 S. Ct. 394, __ U.S. __ (1982), this Court held that defendant voluntarily, knowingly, and intelligently waived his right to counsel and "initiated" further dialogue with the authorities when he "appeared voluntarily and stated that he did not want counsel present during the interrogation." 103 S. Ct. at 395.^{10/} In the immediate case, petitioner did not appear voluntarily, but was in custody at the time he was subjected to interrogation.

It is well-established that "evidence that an accused has previously asserted his right to confer with counsel is a factor which weighs heavily against a finding that a subsequent uncounseled confession is voluntary." United States v. Clark, 499 F.2d at 807. Indeed, "[o]nce the [right to counsel] has been asserted, . . . an interrogation must not be permitted to seek its retraction, total or otherwise." Id. at 807, quoting United States v. Crisp, 435 F.2d 354, 357 (7th Cir.), cert. denied, 402 U.S. 947 (1970).

The present case is much like United States v. Henry, 447 U.S. 264 (1980), in which this Court held that the government violated defendant's right to counsel by intentionally creating a situation likely to induce a defendant to make incriminating statements without the aid of counsel. Id. at 274.

It is clear from the testimony of Sergeant Murry that petitioner was in a highly confused and emotional state when he was interrogated by the officers on January 9 and

^{10/} In Wyrick, defendant had not requested counsel at the time he made this statement.

10. (R.473, 474.) The officers pretended to be friendly and sympathetic and indicated they wanted to talk. The interrogations each lasted for several hours. The officers stopped questioning to let petitioner cry, but started back up whenever he stopped crying. (R.476.) Likewise, on the afternoon of January 10, the officers sequestered and further interrogated petitioner, even though they recognized that he was "confused" and "very upset." (R.479, 480, 481.) Moreover, this last interrogation was conducted without contacting anyone in the Public Defender's Office in spite of the officers' knowledge counsel had been appointed to the case and awareness of petitioner's previous requests for counsel and his confused state. (R.499, 500.) As in Henry, the State violated petitioner's right to counsel by creating and exploiting situations in which petitioner was likely to make self-incriminating remarks in the absence of counsel.

Since petitioner neither "initiated" conversation with the police nor waived his Fifth Amendment right to counsel, his original statement to the police officers that he wished to see an attorney before he made any further statements should have terminated further interrogation. His continued interrogation subsequent to a second request to speak with an attorney is a blatant breach of his constitutional right to counsel.

Thus, we believe that consideration of the present case, in which the decision of the Florida Supreme Court rests upon an erroneous reading of Edwards and other right to counsel cases and upon a faulty analysis of the circumstances surrounding petitioner's request for counsel, would give the Court an opportunity to illuminate further for lower courts the scope of the constitutional right to counsel and under what circumstances that right may be waived.

TWO

PETITIONER'S PRE-TRIAL STATEMENTS TO THE POLICE WHO FAILED TO ADVISE PREVIOUSLY APPOINTED COUNSEL OF THE INTERROGATION WERE OBTAINED IN VIOLATION OF PETITIONER'S RIGHT TO COUNSEL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

In this case, clear evidence was presented at the hearing on petitioner's Motion to Suppress and during the trial that Sergeant Murry and Detective Hitchcox proceeded with the final interrogation of petitioner on the afternoon of January 10, 1980, without informing petitioner's attorney just appointed by the Court a couple hours before at the advisory hearing. (R.499-500.) Sergeant Murry admitted that she knew that petitioner had counsel. (R.500.) She also had been present for both of petitioner's requests for attorney. The record suggests that failure to inform was a knowing one designed to avoid exactly what subsequently occurred -- instructions from the court-appointed attorney for the officers to cease their interrogations.

In the absence of informing counsel, the alleged waiver of the request for counsel expressed the previous afternoon should not have been treated as one by the Florida Supreme Court, as was originally seen by the trial court. For the trial court originally ruled that the statements made during this last interrogation session were inadmissible because after counsel had been appointed petitioner could not be considered to waive his request for counsel. (R.388, 579, 580.) Later the trial court reversed its ruling over petitioner's counsel's objections. (R.411, 412, 432.) The Florida Supreme Court in affirming the trial court's denial of petitioner's motion to suppress argued that there is no per se rule requiring a notification of counsel, and went on

to hold that petitioner had knowingly waived his right to counsel. (App. A, p. 7a.) Petitioner respectfully argues that the original ruling of the trial court was correct and that damaging statements allegedly made by him during the last interrogation should have been suppressed to protect his Fifth Amendment right to counsel for the following reasons.

The decision of the Florida Supreme Court is correct in stating that Massiah v. State, 377 U.S. 201 (1964) does not stand for a per se rule that would prohibit any voluntary and knowing waiver of a right to counsel once counsel has been appointed. (App. A, p. 7.) Right to counsel may be waived. See Johnson v. Zerbst, 304 U.S. 458 (1938) and Escobedo v. Illinois, 378 U.S. 478 (1964). However, the waiver must be judged in light of the surrounding facts and circumstances, of which prior appointment and availability of counsel is one. See Brewer v. Williams, 430 U.S. 387 (1977) (involving police initiated contact when counsel available).

In support of its affirmance of the trial court's denial, the Florida Supreme Court also cited Witt v. State, 342 So. 2d 497 (Fla.), cert. denied, 434 U.S. 935 (1977) for the proposition that representation by counsel does not preclude waiver. Witt, however, is easily distinguishable from this case because it involved a suspect who expressly and directly indicated to the police that he wished to confess to the crime even though he was represented at the time by counsel. Here petitioner had several times expressly indicated that he did not want to confess (e.g. R.501) and that he did not want to talk to the police officers as officers but as human beings, that is, not in an official context. Finally, petitioner's emotional and confused state reflected

in his crying and in his paranoia concerning the police (R.480-481) should have made it clear to the officers that petitioner was not voluntarily and knowingly waiving his right to counsel.

The Florida Supreme Court decision does not seem to take into account the clear testimony that the officers were fully aware that counsel had been appointed and that petitioner was placed in a situation in which it was highly likely that he would make incriminating statements because of his emotional state. Therefore, the Court should reverse the Florida Supreme Court's affirmation of the trial court's denial. Such a reversal would not create a new per se rule on the facts of this case. For example, it would not overrule other Florida cases such as Sanders v. State, 378 So. 2d 880 (Fla. 1st Dist. Ct. 1980) relied on by the trial court. There the officers were merely negligent in not inquiring further as to the existence of counsel. Witt, supra, also would stand. There the waiver was clearly voluntary and knowing.

Finally, petitioner respectfully submits that the Florida Supreme Court, in affirming the denial of petitioner's motions to suppress his statements made on January 10, 1980, has adopted such a broad and vague standard for determining when appointed counsel must be informed of an intention by police officers to conduct an interrogation of his client that the Fifth Amendment right to counsel will be ignored by police trying to get in one last interrogation that might lead to a waiver before counsel has an opportunity to fully advise his client, thereby cutting back on the additional protection that this Court has given to right to counsel in Edwards.

THREE

PETITIONER'S PRE-TRIAL STATEMENTS TO THE POLICE
AND TANGIBLE EVIDENCE TAKEN FROM HIS AUTOMOBILE
WERE OBTAINED AS THE RESULT OF AN ARREST
OR DETENTION WITHOUT PROBABLE CAUSE IN VIOLATION
OF THE FOURTH AND FOURTEENTH AMENDMENTS
TO THE UNITED STATES CONSTITUTION

On January 7, 1980, petitioner was stopped by a marked police car with flashing lights and immediately surrounded by three or four other marked and unmarked police cars, according to testimony presented at the evidentiary hearing and at trial. (R.533, 540.) Petitioner was informed that the police were investigating a homicide and it was important to talk to him at the police station. (R.529-530.)

When asked by Detective Stellje to produce his driver's license, petitioner did so. (R.540.) Petitioner testified that he asked for it back, but was told by Detective Stellje that he would have to go to the police station to get it back. (R.540.) Detective Stellje denied making this statement (R.534), but there is unrebutted testimony by petitioner that the license was given back to him only when he left the police station. (R.558, 560.) His story is also at least partially corroborated by Detective Leake's testimony that he never saw the license given back then or later (R.533), and he seems to have been with petitioner until they all drove off to the police station.

Petitioner also testified that the only reason he went to the police station was to retrieve his license. (R.540.) He felt that without it the police could have picked him up for driving without a license. (R.540.) Petitioner's version gains partial support at least from the fact that it was Detective Stellje's police car that he

followed to the police station (R.530), and Detective Stelljes was the officer who had taken and allegedly not returned the license. Moreover, two more police cars, at least, followed petitioner as he tailed Detective Stelljes' police car.

(R.540.) Another may have pulled up alongside for a short time to completely box petitioner in as he drove along, although Detective Stelljes denied this. (R.540, 562.) Even three police cars in front and back of petitioner would have been enough to indicate to him that he was not to stop following Detective Stelljes to the station.

However, in spite of these generally agreed on facts, both the trial court and the Florida Supreme Court held that there had been no arrest and the trip to the station was voluntary. (App. A, p. 5a.) The Florida Supreme Court based its conclusion on the testimony of the police officers, who "said that [petitioner] was not arrested at this time." However, the words used by police officers to characterize their actions or their intentions are not controlling. Dunaway v. New York, 42 U.S. 200 (1979). The necessary inquiry is whether petitioner's trip to a police station escorted by police cars to retrieve his license and the 45-minute interrogation when there would have seemed to a reasonable person like police "custody."

This Court has very recently addressed other seizures, both of persons and of their property, that were less onerous than that found in the instant case. In U.S. v. Place, 51 U.S.L.W. 4844 (U.S. June 20, 1983) (No. 81-1916), this Court held that a 90-minute detention of a suspected narcotics courier's luggage was too lengthy to be a permissible stop under Terry v. Ohio. Petitioner was

detained for at least an hour, and his car was never returned. The facts in the other case, Florida v. Royer, 51 U.S.L.W. 4293 (U.S. March 23, 1983) (No. 80-2146) (consent to search luggage invalid where involuntary detention exceeded Terry v. Ohio temporary stop), are particularly apposite to the present case. Petitioner and Royer both produced licenses (and an airline ticket) upon request, but did not assent orally. Id. at 4294. Both were asked to accompany officers to another location (far away for petitioner) and their identification was not returned (as far as can be determined in the case of petitioner) until the police were finished. Id. Both were taken to small rooms and "confronted by two police officers - a situation which presents an almost classic definition of imprisonment." Id. (quoting State v. Royer, 389 S.2d 1007 (Fla. App. 1980) (en banc)). Finally, only Royer's luggage was detained, but petitioner's car was eventually seized. In both instances, a primary purpose was to obtain possession of a piece of a suspect's property in order to search it. The seizure occurred before there was sufficient reasonable cause to obtain a search warrant. Id.

Of course, under Dunaway v. New York, with sufficient probable cause the detention of petitioner and seizure of his car for a search would have been permissible. However, it is clear from the facts of the case that, contrary to the conclusion of the Florida Supreme Court (App. A, p. 5), the detectives had at most a reasonable suspicion centering on petitioner and his car. The anonymous tip linking petitioner's license plate and the "bay murder," the statement of a relative that petitioner had a violent

personality and could have done such a deed, the identification of petitioner with a man who accompanied the victim out of the bar on January 2, 1980, and petitioner's prior record were sufficient to create suspicions but not sufficient for probable cause to detain and question petitioner and seize his car without warrants.

The most direct piece of information, the anonymous tip about the license plate, could not have supplied probable cause because there was no basis for its reliability. There was no prior record. Aguilar v. Texas, 378 U.S. 108 (1964). It was not a declaration against interest. United States v. Harris, 403 U.S. 573 (1971). The identity of the caller was not known.

Moreover, that the police themselves felt the lack of probable cause can be seen in the fact that they permitted petitioner to leave the police station on the night of January 7 without arresting him and they resorted to an examination of the petitioner's car from outside instead of obtaining a warrant.

Accordingly, the Florida Supreme Court plainly erred not only in finding that there was no arrest and the visit to the police station was voluntary, but also that there was probable cause for stopping petitioner. (App. A, p. 5a.) The statements made by petitioner at the police station on January 7, 1980, were the product of his illegal detention and arrest in violation of his Fourth Amendment rights. See Clewis v. Texas, 386 U.S. 707 (1967). The seizure of petitioner's car was similarly without probable cause, and the evidence taken from the car was a direct result of the illegal seizure. Therefore, the Florida Supreme Court should have reversed the trial court's denials of petitioner's motions to suppress.

For the above reasons petitioner respectfully submits that his Fourth Amendment rights were violated.

FOUR

TANGIBLE OBJECTS TAKEN FROM PETITIONER'S
CAR WERE OBTAINED AS THE RESULT OF
AN ILLEGAL SEIZURE OF THE CAR WITHOUT
PROBABLE CAUSE IN VIOLATION OF THE
FOURTH AND FOURTEENTH AMENDMENTS
TO THE UNITED STATES CONSTITUTION

On the night of January 7, 1983, while petitioner was being illegally detained and questioned inside the police station, a detective was conducting a search of petitioner's automobile which was parked on a public street. (R.511.) Of course, the car was there because of the illegal detention of petitioner as was argued above. But even if petitioner had not been detained illegally, the impoundment of the car before a search warrant was obtained was a violation of petitioner's Fourth Amendment rights unless an exception exists.

The Florida Supreme Court admitted that there was a seizure without a warrant, but finds that the eventual issuance of the warrant showed there was probable cause for the initial impoundment. (App. A, p. 6a.) However, the Florida Supreme Court has twisted this Court's declaration in Chambers v. Maroney, 399 U.S. 42, 52 (1970), that seizing and holding a car before obtaining a warrant is the same as carrying out an immediate search without a warrant. Both require probable cause. See also Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality opinion) (search warrant required where no immediate need to search the car). Eventual obtaining of a warrant does not prove probable cause for the initial seizure.

The question then becomes was there probable cause to impound the vehicle until a search warrant was obtained. Detective Long's "plain view" search of petitioner's car was not challenged in the Florida Supreme Court.

The results of Detective Long's "plain view" search were a little sand on the floor board, which could have come from anywhere in a seashore city, as Detective Long admitted at the evidentiary hearing. (R.519.) Of the two "suspicious" stains, one turned out to be from Coca-Cola. (R.521.) Detective Long also stated that he could not tell what the nature of the stains was "from outside the vehicle." (R.521.) Detective Long also stated on cross-examination that other than the sand and the stains, he "couldn't ascertain whether or not it was a crime scene with the naked eye." (R.521.) Yet these observations formed part of the affidavit used to obtain the first search warrant for the car (R.107-111), other than the information about petitioner himself which was shown to be insufficient above. The second search warrant was obtained on the basis of the blood sample obtained as the result of the first illegal search without probable cause.

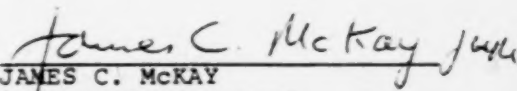
Lacking probable cause to arrest petitioner and lacking probable cause to seize his automobile, the Florida Supreme Court is left with the argument that somehow an exigent circumstance existing because petitioner could have removed the car and destroyed the evidence. However, the only evidence that the officers had reasonable grounds to believe existed were some sand and two stains, none of which were considered by Detective Long to have indicated that the car was the scene of a crime.

The decision of the Florida Supreme Court to uphold as reasonable the seizure by the police of petitioner's car, when he himself was being illegally detained, reveals a court straining to justify searches because of the results produced rather than protecting important Fourth Amendment rights to be secure in property and person.

CONCLUSION

For all the reasons stated above, petitioner respectfully requests that this Court grant a Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,


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Counsel of Record
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Attorneys for Petitioner

Supreme Court of Florida

No. 59,763

ROBERT BRIAN WATERHOUSE, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[February 17, 1983]

PER CURIAM.

This case is an appeal from a judgment of conviction of murder in the first degree. The trial court sentenced appellant to death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Appellant Robert Brian Waterhouse was tried before a jury and found guilty of the murder of Deborah Zammerer, which occurred in St. Petersburg on the night of January 2, 1980. A separate sentencing hearing was held, after which the jury recommended that appellant be sentenced to death. Appellant now challenges the legality of several items of evidence used against him and questions the propriety of the sentence of death on several grounds. We affirm the conviction and the sentence of death.

On the morning of January 3, 1980, the St. Petersburg police responded to the call of a citizen who had discovered the dead body of a woman lying face down in the mud flats at low tide on the shore of Tampa Bay. An examination of the body revealed severe lacerations on the head and bruises around the throat. Examination of the body also revealed--and this fact is recited

not for its sensationalism but because it became relevant in the course of the police investigation--that a blood-soaked tampon had been stuffed in the victim's mouth. The victim's wounds were such that they were probably made with a hard instrument such as a steel tire changing tool. Examination of the body also revealed lacerations of the rectum. The cause of death was determined to have been drowning, and there was evidence to indicate that the body had been dragged from a grassy area on the shore into the water at high tide. The body when discovered was completely unclothed. Several items of clothing were gathered from along the shore at the scene.

The body showed evidence of thirty lacerations and thirty-six bruises. Hemorrhaging indicated the victim was alive, and defense wounds indicated she was conscious, at the time these lacerations and bruises were inflicted. Acid phosphatase was found in the victim's rectum in sufficient amount to strongly indicate the presence of semen there. Also, the lacerations in this area indicated that the victim had been battered by the insertion of a large object. The medical examiner was also able to determine that at the time of the murder the victim was having her menstrual period.

After several days of investigation the police were unable to identify the victim, so they announced the situation to the public. They then received an anonymous telephone call simply informing them of appellant's automobile tag number and advising them to investigate it.

The police also learned the identity of the victim from two of her neighbors. These two acquaintances, Yohan Wentz and Carol Syars, testified at trial that they went to the ABC lounge with the victim on Wednesday night, January 2, 1980. They testified that they later left the lounge and that Ms. Kammerer remained there at that time. Kyle Ginn, who was working there as a bartender that night, testified that the victim came into the bar with a man and a woman, that they later left, that Ms. Kammerer then began talking with appellant (who was known to the

witness) and that at about 1:00 a.m. appellant and Kammerer left the bar together.

On the evening of January 7, 1980, police officers asked appellant to voluntarily go with them to police headquarters for an interview. At this time he said that he did not know any girl named Debbie and that he went to the ABC lounge on January 1 but did not leave with a woman. After this interview appellant was allowed to leave but his car was impounded for searching pursuant to warrant. The automobile was searched on January 8 and appellant was arrested on January 9.

Detectives Murry and Hitchcock arrested appellant. In the car on the way to the police station, after advising appellant of his rights, Hitchcock asked him, "We were right the other night, weren't we, when we talked to you about being involved in this case?" Appellant responded simply, "Right." Shown a picture of Deborah Kammerer, appellant this time admitted that he did in fact know her.

On the afternoon of January 9, the detectives again interviewed appellant. Detective Murry testified concerning this interview. She said that appellant became emotionally upset and said repeatedly that his life was over, that he was going to the electric chair. He said that he wanted to talk to his interviewers as people and not as police officers. He then said that he had some personal problems with alcohol, sex, and violence.

The two detectives interrogated appellant again on January 10. Again appellant said he wanted to talk to them as people rather than as police officers. Detective Murry testified that appellant again indicated that he experienced a problem involving sexual activity. He said that when he drinks a lot, it is like something snaps and he then finds himself doing things that he knows are terrible and bad, and that he cannot control his behavior on such occasions. Appellant also told the officers that when he wanted to engage in sexual activity with a woman but learned that she was having her menstrual period, he would become

frustrated and angry and that this is what had happened the previous Wednesday night. He also said that he had had a lot to drink on Wednesday night.

Inspection of the interior of appellant's car revealed the presence of visible blood stains, and a luminol test revealed that a large quantity of blood had been in the car but had been wiped up. Analysis of the blood in the car and comparison with known blood samples of appellant and the victim revealed that the blood in appellant's car could have come from the victim but was not appellant's blood.

A forensic blood analyst testified that it is possible through analysis of blood stains on certain surfaces to make estimates concerning the direction and velocity of motion of the blood making the stains. This witness concluded from her analysis that the blood in appellant's car was deposited in the course of a violent attack.

A forensic hair analyst testified that hairs found in appellant's car were consistent in their characteristics with known hair samples from the victim.

A forensic fiber analyst testified that fibers found in the debris adhering to the victim's coat were similar to fibers from the fabric of the seat cover in appellant's car. Also, fibers were found in the car that had the same characteristics as fibers from the victim's coat and pants.

Appellant was employed as a plaster and drywall worker. His foreman testified at trial that on the morning of January 1, appellant arrived at work asking for the day off. He appeared to have a hangover and said he was feeling rough. The witness said that at this time appellant had scratches on his face. The witness also said that appellant had told him that he liked anal intercourse and liked being with women who allowed themselves to be hit and slapped.

On this appeal, appellant contends (1) that the trial court erred in denying his motion to suppress the statements he made during his first interview, on January 7; (2) that the trial

court erred in denying his motion to suppress the tangible evidence obtained from inside his car; (3) that the trial court erred in denying his motion to suppress the statements he made after his arrest, on January 9 and 10; (4) that the trial court erred in denying his motions to exclude evidence of collateral unlawful activity; (5) that the trial court erred in giving improper double consideration to a single aggravating factor in imposing the sentence of death; (6) that the trial court erred in considering the aggravating circumstance that the capital felony was committed in the course of a felony since the felony was an essential element of proof of felony murder; (7) that the trial court erred in finding the capital felony was especially heinous, atrocious, or cruel; and (8) that the trial court erred in finding that the murder was committed for the purpose of avoiding arrest. On several of the above points, appellant argues two or more grounds.

Prior to trial, appellant moved to suppress his statement of January 7. Appellant asserted that the initial stop of his car was an illegal arrest and that he was forced to accompany the officers to the police station. At the hearing on the motion, however, the state presented the testimony of officers who said that appellant was not arrested at this time and that he accompanied them voluntarily. Moreover, we conclude that when appellant was first stopped and was asked to go in for questioning, the investigators had reason to believe that appellant and his car had some connection with the murder. Therefore appellant's contention of error in admitting testimony of the January 7 statement is without merit.

Appellant argues that his car was seized without probable cause. After appellant's initial interview was concluded, he was allowed to leave the police station; he was not under arrest at that time. However, he was not allowed to take his car, which he had parked on the street across from the police station. Later that night, a warrant for the search of the car was issued and the next day it was searched. Since appellant was not allowed to

remove his car from where he had parked it, it is indisputable that the car was seized by the state without a warrant. It does not follow, however, that the subsequent search pursuant to a warrant was illegal. There was probable cause for the search, as is evidenced by the issuance of the warrant. There was also the exigent circumstance that the car was on the street and the appellant could have removed it and destroyed the evidence. Therefore, the seizure of appellant's car pending issuance of the warrant for its search was proper, based on probable cause and exigent circumstances. Carroll v. United States, 367 U.S. 132 (1925).

Appellant contends that his statements of January 9 and 10 should have been suppressed because the police violated his right to remain silent by questioning him after he had demonstrated a desire to consult an attorney. In the pretrial proceedings on the motion there was testimony concerning the two interrogation sessions. On January 9 after making certain statements in the car on the way to the station appellant said, "I think I want to talk to an attorney before I say anything else." At this point the officers ceased questioning him. Then, when appellant was being processed into the jail on the charge of murder, Detective Murry asked appellant whether he would like her to come to his cell, talk to him, and answer any questions he might have. He seemed interested, so detectives Murry and Hitchcock went to talk to him at 2:00 a.m. At this point appellant became emotionally upset and made certain statements described previously. The conversation ended when appellant said, "I think I'd like to talk to my attorney. Would you all come back tomorrow?" Then on the following day there was further interrogation eliciting statements entered into evidence.

Appellant also argues that officers violated the fifth amendment by questioning him after he had invoked his right to consult an attorney. He cites Edwards v. Arizona, 451 U.S. 477 (1981), which held that once an accused expresses a desire to deal with the authorities only through counsel, this desire must

be scrupulously honored and the accused is not subject to further interrogation until counsel has been made available, unless the accused himself initiates further communication. Edwards does not apply here because appellant did not express a desire to deal with the police only through counsel. His statements that he thought he should talk to an attorney were at most equivocal requests to consult with counsel. The officers were not prohibited from initiating further communication for the purpose of clarifying appellant's request. Thompson v. Wainwright, 401 F.2d 768 (5th Cir. 1979); Wash v. Estelle, 597 F.2d 513 (5th Cir.), cert. denied, 444 U.S. 981 (1979). Unlike in Edwards, appellant never explicitly stated that he did not want to talk to the police nor was he ever told that he was required to. Therefore the police did not act improperly in visiting appellant and questioning him further after his two equivocal statements expressing possible interest in seeing an attorney.

Appellant argues that the court erred in denying his motion to suppress the statements he made to detectives Murry and Hitchcox on the afternoon of January 10. That morning, appellant was taken to court for his first judicial appearance. At this time the public defender was appointed to represent appellant. Appellant argues that the officers should have notified his attorney before proceeding with the interview. There is no per se rule, however, requiring officers to notify the defendant's counsel before communicating with the accused and we decline to adopt such a rule now. The fact that an accused is represented by counsel does not preclude his waiver of the right to have counsel present when talking to law enforcement officers. Witt v. State, 342 So.2d 497 (Fla.), cert. denied, 434 U.S. 935 (1977). Here the appellant had invited the officers to return, was warned of his rights, and knowingly waived his right to have counsel present.

Appellant also argues that his statements should have been suppressed on the ground that they were not made voluntarily but were the product of actual coercion. We find this argument to be

completely without merit.

Appellant contends that the trial court should have prohibited any reference to some bags of marijuana that were found by the officers who searched and collected evidence from appellant's car. This testimony constituted evidence tending to show criminality separate from and unrelated to the crime charged in the indictment. The evidence was not relevant to any issue of material fact, and therefore should have been held inadmissible. See Williams v. State, 110 So.2d 634 (Fla.), cert. denied, 161 U.S. 847 (1939). The error, however, was harmless. The Williams rule is calculated to prevent the unfairness of convicting the accused on the basis of evidence showing him to have bad character or a propensity to commit crimes such as the one charged. "Evidence that the defendant has committed a similar crime, or one equally heinous, will frequently prompt a more ready belief by the jury that he might have committed the one with which he is charged, thereby predisposing the mind of the juror to believe the prisoner guilty." Nickels v. State, 90 Fla. 639, 683, 106 So. 479, 488 (1915). The admission of irrelevant evidence tending to show commission of a dissimilar or much less serious crime, on the other hand, may be harmless error. See Concolino v. State, 223 So.2d 68 (Fla. 1d DCA), appeal dismissed, 214 So.2d 120 (Fla. 1969), cert. denied, 199 U.S. 927 (1970). Appellant has failed to show how the testimony about the marijuana could have improperly prejudiced the jury against him. We therefore find the error to have been harmless. See State v. Wadsworth, 210 So.2d 4 (Fla. 1968).

Appellant also contends that the trial court erred in allowing the testimony of a cellmate who described an incident after appellant's arrest in which he either committed sexual battery upon another inmate or attempted to do so. Again appellant argues that the testimony was not relevant to any issue of material fact. We find, however, that the testimony was relevant because it included, and explained the context of, an incriminating admission made by appellant. The witness testified

that he did not actually see what transpired between appellant and the other prisoner because the witness and the remaining prisoners were ordered from the room by appellant, who had armed himself with a sharpened spoon. However, the witness said he saw appellant a short time afterward and that appellant, who appeared angry and disheveled, said, "I wonder how he'd like a Coke bottle up his ass like I gave her." The relevance of this admission lies in its connection to the medical examiner's testimony that the victim's rectal lacerations were consistent with the insertion of an object such as a Coke bottle. The statement was therefore relevant and the testimony was admissible to provide the context in which the statement was made. The ruling was not error.

We come now to consideration of the sentencing proceeding and the sentence of death. As aggravating circumstances, the trial court found: (1) that appellant had previously been convicted of second-degree murder in the State of New York, a felony involving violence; (2) that at the time of the murder of Deborah Kammerer, appellant was on parole from the sentence imposed upon him for the New York murder (and was therefore under sentence of imprisonment); (3) that the murder of Deborah Kammerer was committed in the course of committing sexual battery; (4) that the murder of Deborah Kammerer was committed for the purpose of avoiding arrest by eliminating her as a witness to the crime of sexual battery; and (5) that the murder was especially heinous, atrocious, and cruel.

Appellant argues that the trial court gave improper double consideration to a single circumstance by reciting both that appellant had previously been convicted of a violent felony and that he was on parole, citing Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977). The principle of Provence, however, is not applicable here. In Provence we reasoned that proof that a capital felony was committed during the course of a robbery necessarily was based on the same aspect of the crime that provided the basis for finding the motive of

pecuniary gain. The same reasoning does not apply to the two aggravating circumstances in question here. The previous conviction and the parole status were two separate and distinct characteristics of the defendant, not based on the same evidence and the same essential facts. Therefore separate findings of the two factors were proper.

Appellant argues that it was improper for the court to find that the capital felony was committed in the course of the violent felony of sexual battery since the commission of the sexual battery was an essential element of proof of murder under the felony murder theory. This argument is without merit. White v. State, 403 So.2d 331, 335-36 (Fla. 1981).

Appellant argues that the trial court's finding that the crime was especially heinous, atrocious, or cruel was erroneous. The clearly established facts of the murder show that this contention is without merit. The victim suffered numerous bruises and lacerations inflicted with a hard, sharp weapon. There were defense wounds showing that she was alive and conscious when she was attacked. The victim was left in the water where she drowned. The capital felony was especially heinous, atrocious, or cruel. See State v. Dixon, 183 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

Appellant argues that there was insufficient proof that the murder was committed for the purpose of avoiding arrest. In support of this finding the state refers us to a statement appellant made to his interrogators when they asked him what he thought he should do about his "problem." He said, "You do what you have to do to protect Bobby Waterhouse. No one wants to go to jail." It is questionable whether this statement supports the inference drawn by the state. Appellant's statements also included suggestions that the murder was committed in a spur-of-the-moment rage. We need not decide, however, whether the lone statement is sufficient to prove a witness-elimination motive, since even without this aggravating circumstance there are numerous other aggravating circumstances to support the

sentence, and no mitigating circumstances.

Appellant's contentions of error in the judgment are all without merit. The judgment is affirmed. We conclude that under the proven facts of the case, a sentence of death is appropriate. Therefore the sentence of death is also affirmed.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON and McDONALD, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF
FILED, DETERMINED.

An Appeal from the Circuit Court in and for Pinellas County,
Robert E. Beach, Judge - Case No. 80-1925

Philip J. Padovano, Tallahassee, Florida,
for Appellant

Jim Smith, Attorney General and Peggy A. Quince, Assistant
Attorney General, Tampa, Florida,
for Appellee

IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA

Appendix B

CASE NO. CRC8000192CEAS0

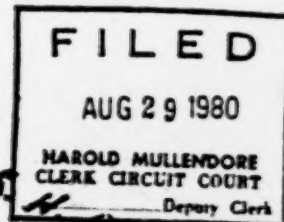
STATE OF FLORIDA

VS

ROBERT BRIAN WATERHOUSE 50456

The following was done in open court this 22nd day of
AUGUST, 1980.

AFTER HEARING SWORN TESTIMONY AND ARGUMENT OF COUNSEL, DEFENDANT'S
MOTION TO SUPPRESS NUMBER I AND II IS HEREBY DENIED. NUMBER III GRANTED
AS TO STATEMENTS MADE JANUARY 10, 1980 AND DENIED AS TO THE BALANCE OF SAID
MOTION.



Dated this 22nd day of AUGUST, 1980, in ST PETERSBURG
Florida.

CIRCUIT JUDGE

IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA

CASE NO. CRC8000192CFA50

STATE OF FLORIDA

VS

ROBERT BRIAN WATERHOUSE

50456

The following was done in open court this 25th day of
AUGUST, 1980.

AFTER ARGUMENTS OF COUNSEL, IT IS CONSIDERED AND ORDERED THAT THE STATES RE-HEARING OF MOTION TO SUPPRESS PREVIOUSLY HAVING BEEN GRANTED ON AUGUST 22, 1980. THE COURT HEREBY VACATES AND SETS ASIDE PREVIOUS RULING ON MOTION TO SUPPRESS OF AUGUST 22, 1980 AND THE MOTION IS DENIED AT THIS TIME.

FILED

AUG 26 1980

HAROLD MULLENDORE
CLERK CIRCUIT COURT
Deputy Clerk

E. H. *Carlin*

Dated this 25th day of AUGUST, 1980, in ST. PETERSBURG,
Florida.

David F. Patterson
CIRCUIT JUDGE

FILED

SEP - 3 1980

HAROLD MULLENDORE
CLERK, CIRCUIT COURT

STATE OF FLORIDA

vs.

ROBERT BRIAN WATERHOUSE 00050456

JUDGMENT AND SENTENCE - CAPITAL CASE - DEATH PENALTY

You, the defendant herein, being present in person and with counsel, PAUL SCHERER and JOHN THOR WHITE, having been duly and regularly tried by a petit jury of twelve people for the crime of

MURDER IN THE FIRST DEGREE

as charged in the indictment. And you being now attended by your counsel in open court, and having been called upon to say why sentence should not be pronounced upon you, and you having said nothing which would bar or preclude such sentence, it is, therefore,

THE SENTENCE OF THE LAW AND THE JUDGMENT AND ORDER OF THIS COURT, that you, for the crime of MURDER IN THE FIRST DEGREE, for which you now stand convicted, shall be taken by the Sheriff of the County of Pinellas to the common jail of said County or the State Prison in the State of Florida and there securely kept until such time as the Governor of the State of Florida shall in and by his Warrant fix and appoint, at which time you shall be delivered by the Sheriff of said County to the Superintendent of the State Prison of the State of Florida, at the place of execution named in the Governor's Warrant as soon as may be after receipt by the Sheriff of the said County of the Death Warrant for you from the Governor of said State, at which time and place in said Warrant fixed and named, and within the walls of the permanent death chamber provided by law, you shall be, by the proper execution officer of the State Prison, electrocuted until you are dead. And may God have mercy on your soul.

Thereupon the defendant was remanded to the custody of the Sheriff.

Robert B. B...
Judge of the Circuit Court

Left four fingers

Left
ThumbRight
Thumb

Right four fingers

Impressions made by:

Deputy Sheriff

I hereby certify that the above and foregoing fingerprints on this Judgment are the fingerprints of the defendant, ROBERT BRIAN WATERHOUSE, and that they were placed thereon by said defendant in my presence, in open court, this the 3rd day of September, 19 80.

Robert B. B...
Judge of the Circuit Court

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
CRIMINAL DIVISION
CIRCUIT CRIMINAL NO. 80-192

STATE OF FLORIDA

VS.

ROBERT BRIAN WATERHOUSE 50456

MURDER IN THE FIRST DEGREE

ORDER

FILED

SEP 15 1980

HAROLD MULLENBORN
CLERK OF DISTRICT COURT
Deputy Clerk

THIS CAUSE came on to be heard on the sentencing of Defendant, ROBERT BRIAN WATERHOUSE, following the conviction of Murder in the First Degree and an advisory verdict recommending the death penalty by a jury of twelve of his peers and the Court having heard the case in chief and considered the mitigating and aggravating circumstances, makes the following Findings of Facts and Orders:

AGGRAVATING CIRCUMSTANCES

A. The Defendant, ROBERT BRIAN WATERHOUSE, was previously convicted in New York of the felony of Murder in the Second Degree. The Defendant was sentenced to twenty (20) years to life for the commission of that crime but was paroled after serving approximately eight (8) years in the New York prison system. At the time of the commission of the present homicide, ROBERT BRIAN WATERHOUSE was on lifetime parole from New York.

B. At the time of the commission of the present homicide, ROBERT BRIAN WATERHOUSE was previously convicted of the said New York felony involving the use or threat of violence to the victim of the said New York homicide.

C. The Murder in the present case was committed by ROBERT BRIAN WATERHOUSE while ROBERT BRIAN WATERHOUSE was engaged in the commission of a Rape, also known as an Involuntary Sexual Battery, a life felony, upon the victim.

D. The Murder in the present case was committed for the purpose of avoiding or preventing a lawful arrest in that the victim in the instant case was killed in order to eliminate her as a witness

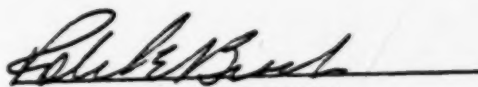
E. The Murder was committed by ROBERT BRIAN WATERHOUSE in an extremely wicked, outrageous, shocking, evil, and vile manner, and in a way designed to inflict a high degree of pain upon the victim with utter indifference to the suffering of the victim, and, therefore, was especially heinous, atrocious, and cruel.

MITIGATING CIRCUMSTANCES

A. None.

THEREFORE, it is the order of this Court that the Defendant, ROBERT BRIAN WATERHOUSE, be sentenced to death in the electric chair.

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida, this 12 day of September, 1980.


CIRCUIT JUDGE

Copies furnished to:

JACK HELINGER and ROBERT MERKLE, State Attorney's Office,
150 - Fifth Street North, St. Petersburg, Florida;

PAUL SCHERER and JOHN WHITE, Attorneys for the Defendant,
2901 - First Avenue North, St. Petersburg, Florida.

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, APRIL 27, 1983

Appendix C

ROBERT BRIAN WATERHOUSE,

**

Appellant,

**

CASE NO. 59,765

vs.

**

Circuit Court Case No. 80-192S
(Pinellas)

STATE OF FLORIDA,

**

Appellee.

**

On consideration of the petition for rehearing filed by
attorney for appellant,

IT IS ORDERED by the Court that said petition be and the
same is hereby denied.

ALDERMAN, C.J., ADKINS, BOYD, and OVERTON, JJ., Concur
McDONALD, J., Dissents

A True Copy

TEST:

C
cc: Hon. Karleen F. DeBlaker, Clerk
Hon. Robert E. Beach, Chief Judge

Philip J. Padovano, Esquire
Mr. Robert Brian Waterhouse
Peggy Quince, Esquire

Sid J. White
Sid J. White
Clerk Supreme Court

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ROBERT BRIAN WATERHOUSE,

Petitioner,

v.

STATE OF FLORIDA,


Respondent.

AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA: ss:

The undersigned, John H. More, being duly sworn, hereby deposes and states on his oath that on this 26th day of July, 1983, he has served one copy each of Petitioner's Petition for Writ of Certiorari to the Supreme Court of Florida and Motion to Proceed in Forma Pauperis with attachments, by first-class mail, postage prepaid, upon the Honorable Jim Smith, Attorney General of the State of Florida, The Capitol, Tallahassee, Florida 32304.

All parties required to be served by me have been served.



JOHN H. MORE
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Subscribed and sworn to before me this 26th day
of July, 1983.

NOTARY PUBLIC

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

ROBERT BRIAN WATERHOUSE,

Petitioner,

v.

STATE OF FLORIDA

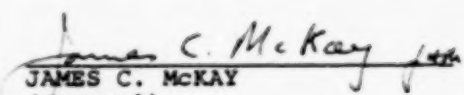
Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Robert Brian Waterhouse, who is now held in the Florida State Prison at Starke, Florida, asks leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of Florida without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. 28 U.S.C. § 1915(a); Adkins v. Du Pont Co., 335 U.S. 331 (1948).

Attached hereto are copies of an Affidavit of Insolvency, Orders of Insolvency, and Appointing Attorney filed for petitioner in the Circuit Court for Pinellas County, Florida. Attached also is a copy of an affidavit in the hands of petitioner who presently is incarcerated

in the State of Florida. I will file the affidavit when it has been executed and delivered to me. The firm of Covington & Burling has taken this case on a pro bono publico basis.


JAMES C. MCKAY
(Counsel)
JOHN H. MORE

Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Petitioner

July 26, 1983

COUNTY COURT, PINELLAS COUNTY, FLORIDA

CRIMINAL DIVISION

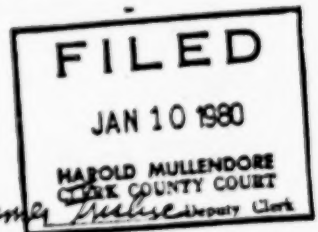
CASE NO. CRC 80 00192 CPAS

STATE OF FLORIDA

VS.

Robert B. Waterhouse
50456

AFFIDAVIT OF INSOLVENCY



Affiant being first duly sworn on oath deposes and says that he is totally insolvent and utterly unable to pay the charges, costs or fees in this cause either in whole or in part; that he has no property or other means of payment either in his possession or under his control and that he has not divested himself of any property, either real or personal, for the purpose of receiving benefit from his oath; that he, at this time, is wholly without funds and unless this Court makes and enters an Order adjudging him, this defendant, insolvent, he will be deprived of his rights under the law in such cases made and provided. This affiant offers himself up to the Court for the purpose of further examination into his insolvency.

Affiant further says that he has been informed that a lien for the value of the services rendered him by the Public Defender, and/or his costs of defense may be impressed by law on any property he now has, or may hereafter have, in the State of Florida, and he hereby waives notice of any proceedings at which the value of the services of the Public Defender and/or costs of defense, as aforesaid, may be determined, and further waives any notice of the filing of the aforesaid lien.

(sign here) *Robert B. Waterhouse*

ORDER OF INSOLVENCY AND APPOINTMENT OF PUBLIC DEFENDER

The above named Defendant, being before the Court and the said Defendant having filed in this Court his Affidavit of Insolvency; and testimony having been taken before the Court; and the Court being otherwise fully advised in the premises, it is, thereupon

ORDERED AND ADJUDGED that the Defendant be, and he is hereby, declared to be insolvent within the meaning of Sec. 27.52 FLORIDA STATUTES; and it is further

ORDERED AND ADJUDGED that the Office of the Public Defender for the Sixth Judicial Circuit, in and for Pinellas County, Florida, is hereby appointed to represent said Defendant in the above styled cause.

IT IS FURTHER ORDERED that in the event the defendant, or his parents, is ordered to pay for the costs of the Public Defender's services, then the Public Defender shall, within 30 days of the final determination of this cause, submit a Motion to this Court to Establish the Value of the Services of the Public Defender. If the Court has also ordered the defendant to pay for the costs of defense, then the Public Defender shall, within 30 days of final determination of this cause, submit an Itemized Statement of Costs of Defense, such lists can be obtained from the Clerk's Office of the Board of County Commissioners.

at *St. Petersburg*, Florida, this *10* day of *JAN*, A.D., 19 *1980*

[Signature]
COUNTY JUDGE

IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA

CASE NO. CRC8000192CFA50

FILED

STATE OF FLORIDA

VS

ROBERT BRIAN WATERHOUSE

50456

OCT 8 1980

SID J. WHITE
CLERK SUPREME COURT

The following was done in open court this 4th day of
September, 19 80.

IT IS CONSIDERED AND ORDERED THAT THE COURT HEREBY APPOINTS ATTORNEY
PHILLIP PADAVANO TO REPRESENT THE DEFENDANT IN THE ABOVE CAUSE FOR PURPOSES
OF APPEAL.

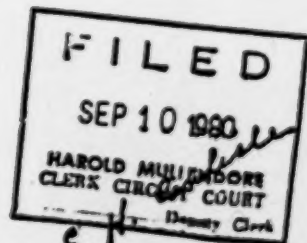
STATE OF FLORIDA
COUNTY OF PINELLAS

This Copy is a true Copy of Original

Order on file in this Office,
WITNESS, my hand and the Official Seal, this
6th day of Oct, A. D., 19 80

HAROLD MULLENDORE
Clerk of Circuit Court

By Scotty J. Anderson
Deputy Clerk



Dated this 4th day of September, 19 80, in St. Petersburg,
Florida.

Philip Padavano
CIRCUIT JUDGE

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

ROBERT BRIAN WATERHOUSE, Petitioner

v.

STATE OF FLORIDA, Respondent

AFFIDAVIT

I, Robert Brian Waterhouse, being first duly sworn according to law, depose and say, in support of any motion for leave to proceed without being required to prepay costs or fees: (1) I am the petitioner in the above-titled case. (2) Because of my poverty I am unable to pay the costs of my petition. (3) I am unable to give security for the same. (4) I believe that I am entitled to the redress I seek in said case. (5) The nature of the case is briefly stated as follows:

I was sentenced to death by the Circuit Court of Pinellas County, Florida, on a first degree murder charge. The present proceeding was commenced to reverse my conviction and sentence on constitutional grounds.

Robert Brian Waterhouse

Duly witnessed and sworn before me,
a Notary Public, this ____ day of
June, 1983.

Notary Public

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT B. WATERHOUSE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Florida

APPLICATION FOR EXTENSION OF TIME IN WHICH
TO FILE PETITION FOR WRIT OF CERTIORARI
AND PERMISSION TO FILE A SUBSTITUTE PETITION

To the Honorable Lewis F. Powell, Jr., Associate
Justice of the United States and Circuit Justice for the
Eleventh Circuit:

Petitioner Robert B. Waterhouse prays that an
order be entered further extending the time for filing a
petition for writ of certiorari to and including August 25,
1983. This application is being submitted together with a
Petition for a Writ of Certiorari in order to preserve
petitioner's constitutional issues. The reasons for this
extraordinary request are set forth below at p. 3. The
relevant dates for this application for extension are:

April 27, 1983: Petition for rehearing denied by the Supreme Court of Florida.

June 27, 1983 (June 26 is a Sunday): Expiration of time for filing petition for writ of certiorari in this Court, unless extended.

July 26, 1983: Expiration of requested 30-day extension of time for filing a petition in this Court.

July 26, 1983: Time for filing per Order Extending Time to File Petition for Writ of Certiorari, dated June 17, 1983, by Justice Lewis F. Powell, Jr.

No opinion was rendered by the Supreme Court of Florida in the course of denying the petition for rehearing. The pertinent nature of the petitioner's case is as follows:

1. Petitioner was sentenced to death in 1980 in the Circuit Court for Pinellas County, Florida, after a trial and sentencing hearing before a jury.
2. On February 17, 1983, the Supreme Court of Florida in a per curiam opinion affirmed the conviction of murder in the first degree and sentence of death, overruling Petitioner's constitutional contentions that (a) his statements should have been excluded from evidence on the grounds that (i) they were obtained as the result of an illegal arrest or detention, (ii) they were obtained after he had expressed his intention to remain silent, (iii) his final statement was obtained in an interview conducted without notice to his court-appointed attorney, and (iv) there was no showing that the statements were made voluntarily; (b) tangible evidence seized from his car should have been excluded on the grounds that the evidence was obtained as the result of an illegal arrest or detention and of a search made without probable cause or search warrant; (c) evidence

of Petitioner's alleged use of marijuana and an alleged homosexual rape attempt should have been excluded on grounds of lack of relevance; (d) the evidence was insufficient to support a finding that a capital felony had been committed by Petitioner for the purpose of avoiding or preventing a lawful arrest or a finding that the capital felony was particularly heinous, atrocious, and cruel; (e) the trial judge erred in basing two of the aggravating circumstances on a single prior act of Petitioner; and (f) involuntary sexual battery was an essential element of the homicide and, as such, could be used as an aggravating circumstance.

This Court's jurisdiction under 28 U.S.C. § 1257(3) will be invoked.

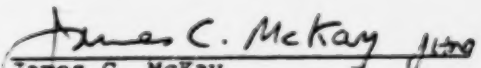
This extension of time and permission to substitute a final Petition is requested since (1) the undersigned were ordered by the petitioner, Robert B. Waterhouse, today by telephone not to file the Petition for a Writ of Certiorari, which accompanies this Application, on the grounds that he has not reviewed and approved the final version of the Petition to be filed; (2) petitioner wishes to have an extension of time to be able to review the final version before it is filed; (3) petitioner has refused to sign an affidavit for the Motion to Proceed in Forma Pauperis until he has reviewed the draft and approved its filing, (4) petitioner indicates that he will write the Supreme Court to have the Petition withdrawn if he does not receive the opportunity to review and approve; and (5) the gravity of the death penalty warrants the provision of sufficient extra time to enable petitioner to review the Petition and suggest any reasonable changes. Extension of the time for filing to

August 25, 1983, would provide enough time to accomplish the tasks mentioned above.

Since Petitioner continues to be incarcerated in the Florida State Prison, no prejudice to the State's concerns can result from an additional 30-day extension of time requested.

Wherefore, Petitioner respectfully requests an order extending the time for filing a petition for writ of certiorari to and including August 25, 1983.

Respectfully submitted,


James C. McKay
Counsel of Record
John H. More

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

July 26, 1983

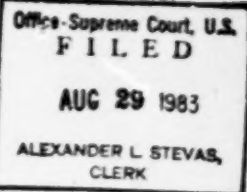
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 1983, copies of this application were mailed, postage prepaid, to the Attorney General of the State of Florida, Tallahassee, Florida. I further certify that all parties required to be served have been served.

Mr. H. Mae
Counsel for Petitioner

83-5507



Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT BRIAN WATERHOUSE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI IN THE
SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

PEGGY A. QUINCE
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammel Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR RESPONDENT

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OPINION BELOW

The opinion of the Florida Supreme Court sought to be reviewed is reported as Waterhouse v. State, 429 So.2d 301 (Fla. 1983).

STATEMENT OF THE CASE AND FACTS

The Petitioner, Robert Brian Waterhouse, was indicted for the first degree murder of Deborah Kammerer. He was found guilty by a jury, and a separate sentencing hearing was held. The jury recommended death, and the trial court entered and Order sentencing Petitioner to death. Appeal was taken to the Florida Supreme Court raising the following issues:

POINT ONE

THE STATEMENTS OF THE DEFENDANT AND THE TANGIBLE EVIDENCE TAKEN FROM HIS CAR SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE ON THE GROUND THAT THEY WERE OBTAINED AS A RESULT OF AN ILLEGAL ARREST OR DETENTION.

POINT TWO

THE TANGIBLE OBJECTS TAKEN FROM THE DEFENDANT'S CAR SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE ON THE GROUND THAT THE POLICE OFFICERS LACKED PROBABLE CAUSE TO SEIZE THE VEHICLE PRIOR TO THE TIME THEY OBTAINED A WARRANT TO SEARCH ITS CONTENTS.

POINT THREE

THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THE OFFICERS FAILED TO TERMINATE THEIR QUESTIONING AFTER THE DEFENDANT EXPRESSED HIS INTENTION TO REMAIN SILENT.

POINT FOUR

THE DEFENDANT'S FINAL STATEMENT SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THE OFFICERS FAILED TO ADVISE THE DEFENDANT'S COURT APPOINTED ATTORNEY THAT THEY WERE CONDUCTING AN INTERVIEW.

POINT FIVE

THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THEY WERE NOT SHOWN TO HAVE BEEN MADE VOLUNTARILY.

POINT SIX

THE EVIDENCE OF THE DEFENDANT'S ALLEGED POSSESSION OF MARIJUANA WAS IMPROPERLY ADMITTED BECAUSE IT DID NOT MEET THE RELEVANCY TEST REQUIRED BY THE FLORIDA EVIDENCE CODE AND THE WILLIAMS RULE.

POINT SEVEN

THE EVIDENCE OF AN ALLEGED HOMOSEXUAL RAPE ATTEMPT WAS IMPROPERLY ADMITTED BECAUSE IT DID NOT MEET THE RELEVANCY TEST REQUIRED BY THE FLORIDA EVIDENCE CODE AND THE WILLIAMS RULE.

POINT EIGHT

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CAPITAL FELONY WAS COMMITTED BY THE DEFENDANT FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

POINT NINE

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CAPITAL FELONY WAS PARTICULARLY HEINOUS, ATROCIOUS AND CRUEL.

POINT TEN

THE TRIAL JUDGE ERRED IN BASING TWO AGGRAVATING CIRCUMSTANCES ON ONE PRIOR ACT OF THE DEFENDANT.

POINT ELEVEN

THE INVOLUNTARY SEXUAL BATTERY WAS AN ESSENTIAL ELEMENT OF THE HOMICIDE AND AS SUCH, IT COULD NOT CONSTITUTIONALLY BE USED AS AN AGGRAVATING CIRCUMSTANCE.

Attached hereto as Appendix I are copies of the appellate briefs filed in this cause. The Supreme Court of Florida affirmed both the judgment and sentence. Waterhouse v. State, supra. This Petition for Writ of Certiorari followed.

On the morning of January 3, 1980, St. Petersburg police received a call from a citizen indicating the nude dead body of a white female had been discovered face down in the mud flats on the shore of Tampa Bay. Examination of the body revealed numerous bruises around the throat, severe lacerations over the scalp area, the right eye was swollen and black, and there were numerous other body bruises. A blood-soaked tampon was stuffed in the victim's mouth. There were also lacerations to the rectum.

The wounds were such that they were probably made with a hard instrument such as a tire changing tool. Drag marks in a grassy area and marks on the victim's shoulder indicated the body

had been dragged. Close scrutiny of the scene revealed the girl had been dragged to the shore at high tide. The cause of death was determined to be drowning.

There were 30 lacerations and 36 bruises over the body which had been inflicted prior to her death. The rectum displayed evidence of mutilation by multiple tearing wounds. Scientific evidence indicated the victim had been anally assaulted with a penis and a foreign object. Based on the amount of hemorrhaging in the rectal area, the mutilation occurred prior to death. A front tooth was missing and there was evidence indicating this had recently happened. The medical evidence also revealed the victim had been choked to such an extent as to cause hemorrhages in the eyes, lining of the voice box and muscles of the neck. The victim had been on her menstrual period at the time of the murder.

On January 5th the police received an anonymous phone call giving a license number in reference to the bay murder. The number given was GMU 603. The caller did not identify himself, but his voice was that of an older man, with a New England or New York accent. It was determined that the car was a Plymouth registered to Petitioner. A check of Petitioner revealed he had served eight years for the murder of a white female in New York, and he was on a life parole. The previous victim had been choked and battered and left nude. The police began a surveillance of Petitioner.

On January 7th the police received information that Deborah Kammerer was possibly the murder victim. Two of Ms. Kammerer's acquaintances, Yohan Wenz and Carol Byers testified they last saw the victim on January 2nd when the three went to the ABC Lounge. Shortly before midnight Wenz and Byers left, but Debbie remained. Kyoe Ginn, a barmaid at the ABC, stated Debbie left around 1:00 a.m. with a white male. Ginn was shown a group of pictures; she identified Petitioner as the person Debbie left with.

On the evening of January 7th, police officers asked Petitioner to voluntarily go with them to police headquarters for an interview. At this time he said that he did not know any girl named Debbie and that he went to the ABC Lounge on January 2nd but did not leave

with a woman. After this interview Petitioner was allowed to leave but his car was impounded for searching pursuant to warrant. The automobile was searched of January 8, and Petitioner was arrested on January 9.

Detectives Murry and Hitchcox arrested Petitioner. In the car on the way to the police station, after advising Petitioner of his rights, Hitchcox asked him, "We were right the other night, weren't we, when we talked to you about being involved in this case?" Petitioner responded simply, "Might." Shown a picture of Deborah Kammerer, Petitioner this time admitted that he did in fact know her.

On the afternoon of January 9, the detectives again interviewed Petitioner. Detective Murry testified concerning this interview. She said that Petitioner became emotionally upset and said repeatedly that his life was over, that he was going to the electric chair. He said that he wanted to talk to his interviewers as people and not as police officers. He then said that he had some personal problems with alcohol, sex and violence.

The two detectives interrogated Petitioner again on January 10. Again Petitioner said he wanted to talk to them as people rather than as police officers. Detective Murray testified that Petitioner again indicated that he experienced a problem involving sexual activity. He said that when he drinks a lot, it is like something snaps and he then finds himself doing things that he knows are terrible and bad, and that he cannot control his behavior on such occasions. Petitioner also told the officers that when he wanted to engage in sexual activity with a woman but learned that she was having her menstrual period, he would become frustrated and angry that this is what had happened the previous Wednesday night. He also said that he had a lot to drink on Wednesday night.

Inspection of the interior of Petitioner's car revealed the presence of visible blood stains, and a luminol test revealed that a large quantity of blood had been in the car but

had been wiped up. Analysis of the blood in the car and comparison with known blood samples of Petitioner and the victim revealed that the blood in Petitioner's car could have come from the victim but was not Petitioner's blood.

A forensic blood analyst testified that it is possible through analysis of blood stains on certain surfaces to make estimates concerning the direction and velocity of motion of the blood making the stains. This witness concluded from her analysis that the blood in Petitioner's car was deposited in the course of a violent attack.

A forensic hair analyst testified that hairs found in Petitioner's car were consistent in their characteristics with known hair samples from the victim.

A forensic fiber analyst testified that fibers found in the debris adhering to the victim's coat were similar to fibers from the fabric of the seat cover in Petitioner's car. Also fibers were found in the car that had the same characteristics as fibers from the victim's coat and pants.

Petitioner was employed as a plaster and drywall worker. His foreman testified at trial that on the morning of January 3, Petitioner arrived at work asking for the day off. He appeared to have a hangover and said he was feeling rough. The witness said that at this time Petitioner has scratches on his face. The witness also said that Petitioner had told him that he liked anal intercourse and liked being with women who allowed themselves to be hit and slapped.

ARGUMENT

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

ISSUE I

THE PRE-TRIAL STATEMENTS TO THE POLICE DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHT TO COUNSEL

The Petition for Writ of Certiorari should be denied because the state courts, applying relevant federal law, found Petitioner's right to counsel had not been violated.

This Court in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) held a criminal defendant must be advised by police he has the right to consult with an attorney before submitting to custodial questioning. If the defendant invokes his right to counsel, interrogation must cease until the defendant has an opportunity to consult with counsel. More recent cases from this Court have interpreted Miranda as indicating once the right to counsel has been invoked, a defendant can still waive the right. However, it must be shown that the defendant initiated further contact with the police. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) and Oregon v. Bradshaw, 33 Cr.L. 3211 (1983). Petitioner argues he did not initiate further contact with police, and his statement on January 9th after booking should be suppressed pursuant to Edwards.

Respondent respectfully submits the case sub judice is both factually and legally distinguishable from Edwards v. Arizona, supra. Furthermore, this case presents no new issue which cannot be resolved by applying existing federal law to the facts and circumstances of this case.

Prior to this Court's decision in Edwards the Fifth Circuit Court of Appeals and this Court had recognized invocation of the right to counsel was not a blanket prohibition against interrogation. See Michigan v. Moseley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979) and Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979).

The Nash Court addressed itself to the situation, which we have here, of a defendant who makes an equivocal request for counsel.

Sub judice, Petitioner was arrested and read his Miranda rights. He acknowledged his understanding of those rights and responded to police questioning. After answering a few questions he stated, "I think I want to talk to an attorney." Questioning ceased, and the officers proceeded to the police station where Petitioner was booked. Once booking was completed Officers Murry and Hitchcox told Petitioner they would come up to answer any questions he might have or talk with him, if he wanted them to. Petitioner indicated he would be interested. This is the kind of situation contemplated in Nash v. Estelle, supra., and Thompson v. Wainwright, supra. The defendant made an equivocal request for counsel, and the police further inquired to clarify the equivocation. Blasingame v. Estelle, 604 F.2d 893 (5th Cir. 1979) and Jurek v. Estelle, 623 F.2d 929 (5th Cir 1980)

This Court cited with apparent approval the Nash and Thompson holdings in footnote 9 of the Edwards opinion. The right of the police to clarify a defendant's wishes has retained viability in post-Edwards cases. See McCree v. Housewright, 689 F.2d 797 (8th Cir. 1982); White v. Finkbeiner, 687 F.2d 885 (7th Cir. 1982); Silva v. Estelle, 672 F.2d 457 (5th Cir. 1982) and Gorel v. United States, 531 F.Supp. 368 (U.S.D.C., S.D. Tex. 1981).

In Edwards there is no equivocation concerning the request for counsel. On the morning after he made it clear he only wanted to deal with the police through counsel, two detectives came to see him. Edwards said he did not want to talk, and they said he had to. Thereafter, an incriminating statement was made. Edwards request for counsel was clear; the police in essence made him talk. There was no point to be clarified; thus, the police in Edwards should have honored his request for counsel. The Nash and Thompson principles were clearly not applicable to Edwards.

by law enforcement officers to forego his clearly invoked right to counsel. Petitioner equivocally requested counsel, then voluntarily decided to deal with the police without counsel. The State Supreme Court found the police did not act improperly in further questioning Petitioner; this was also the implicit finding of the trial court. This finding is supported by the record and should be affirmed. Oregon v. Bradshaw, 33 Cr.L. at 3213 and 3214. Certiorari should be denied.

ISSUE II

THE PRE-TRIAL STATEMENT MADE AFTER COUNSEL WAS APPOINTED BUT IN COUNSEL'S ABSENCE DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHT TO COUNSEL

Certiorari should likewise be denied on this issue since no new constitutional issue is involved here, and the state court opinion comports with existing federal law on the issue. Even Petitioner recognizes there is no per se rule requiring agents of the State to notify defense counsel before they talk with a defendant. A defendant can, after both requesting counsel and consulting with counsel, waive the presence of counsel and submit to police questioning. Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964)

The question of a Sixth Amendment waiver is to be determined from the facts and circumstances surrounding the interrogation. United States v. Massey, 437 F.Supp. 843 (U.S.D.C., M.D. Fla. 1977) and Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)

On the previous evening, Petitioner had talked with Officers Murry and Hitchcox. He exercised his right to terminate the interview, but invited the officers to return the next day. In the interim, Petitioner was taken to a first appearance, and counsel was appointed. He consulted with counsel for a couple of hours. The officers returned and Petitioner evidenced a willingness to talk. He indicated he understood his rights, indeed Petitioner was a convicted felon who had been through the process before, including the right to have counsel present.

The state court's findings do not violate any of Petitioner's constitutional rights.

PETITIONER WAS NOT DETAINED OR
SEIZED WITHIN THE MEANING OF THE
FOURTH AMENDMENT THUS THE JANUARY 7th
STATEMENT WAS NOT OBTAINED IN VIOLATION
OF PETITIONER'S CONSTITUTIONAL RIGHTS

The Petition for Writ of Certiorari should be dismissed since Petitioner was never seized or detained within the meaning of the Fourth Amendment. Petitioner argues he was detained without probable cause and his statement and physical evidence should have been suppressed. However, the trial court specifically found Petitioner voluntarily accompanied the officers to the police station. See United States v. Williams, 604 F.2d 1102 (8th Cir. 1979). This ruling is supported by the record and is not clearly erroneous; therefore, it should be accepted. United States v. Johnson, 563 F.2d 936 (8th Cir. 1977)

This Court said in Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2044, 36 L.Ed.2d 854 (1973) the surrounding circumstances must be concerned in determining if a Fourth Amendment seizure or detention has occurred. Accord State v. Grant, 392 So.2d 1362, 1364 (Fla. 4th DCA 1981). Factors to be considered include the threatening presence of several officers, display of weapons, some physical touching of the citizen and use of language or tone compelling compliance with the request.

Sub judice, the evidence revealed two officers - Leake and Stelljes - actually approached Petitioner at his vehicle, although an officer in a marked car effectuated the stop. However, Petitioner voluntarily exited the car; he was not ordered but by the officers. No guns were drawn, nor was Petitioner handcuffed. Petitioner was asked, not ordered, to come to the police station, and the officers made no threats. And there is no evidence of any physical touching by the officers. The officer specifically told Petitioner he did not have to come to the station. And once there, it was made clear to Petitioner he could leave at any time. And in fact Petitioner was allowed to

leave when he indicated he wanted to.

Although there was some contradictory testimony concerning the retention of Petitioner's driver's license and the number of officers, the trial court was faced with credibility determinations. The judge actually heard the evidence and assessed the weight and believability of witnesses. The judgment of the trial court should not be disturbed since it is supported by competent evidence. Oregon v. Bradshaw, supra.

ISSUE IV

THE SEIZURE OF PETITIONER'S VEHICLE
WAS BASED ON PROBABLE CAUSE THUS
THE PHYSICAL EVIDENCE OBTAINED FROM
THE VEHICLE WAS PROPERLY ADMITTED

At the time Petitioner's vehicle was seized law enforcement officers has probable cause to believe a search of the vehicle would yield evidence of a crime. The police had received an anonymous caller saying the car involved had license number GMU 603. A check of the number indicated Petitioner owned that vehicle. Petitioner's background had been checked revealing a prior murder of a female who had been choked and battered and left nude. The police believed from crime scene evidence that the victim had been beaten elsewhere, and the body brought to the beach. A barmaid at the ABC Lounge stated Petitioner left the bar with the victim the night before the body was found. Additionally, Officer Long observed sand on the car floor and dark stains on the seat.

Based on these factors Long had probable cause to seize the vehicle. Chambers v. Maroney, 399 U.S.42, 90 S.Ct. 1975, 26 L. Ed.2d 419 (1970) In Chambers the Supreme Court held given probable cause the officers could either seize the car until there has been judicial determination of probable cause (search warrant) or carry out an immediate search without a warrant. Accord

United States v. Fultz, 622 F.2d 204 (6th Cir. 1980) and United States v. Brown, 635 F.2d 1207 (6th Cir. 1980).

Since Chambers v. Maroney decision our Courts have recognized a less stringent standard than probable cause for seizure - detention - of personal property. The Seventh Circuit in United States v. Klein, 626 F.2d 22 (7th cir. 1980) held the detention of personal property analogous to a Terry detention of an individual; therefore, the applicable standard for such detention is reasonable suspicion. The Court based its ruling on the Supreme Court case of United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970).

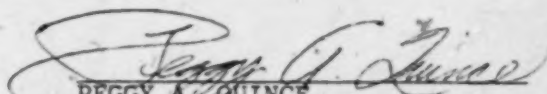
In this instance there was not only reasonable suspicion but also probable cause to seize Petitioner's personal property, the vehicle. Since Petitioner's constitutional rights were not violated, the evidence obtained as a result of the search was properly admitted.

CONCLUSION

The Petition for Writ of Certiorari should be denied since his constitutional rights were not violated.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

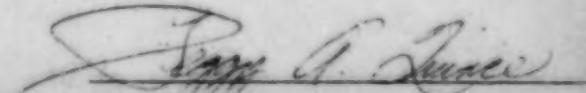


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to James C. McKay, Esq., 1201 Pennsylvania Ave., N.W., Post Office Box 7566, Washington, D.C. 20044 on this 25th day of August, 1983.



Of Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

ROBERT BRIAN WATERHOUSE,

Appellant,

v.

Case No. 59,765

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
FOR PINELLAS COUNTY, FLORIDA

BRIEF OF APPELLEE

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ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN DENYING
APPELLANT'S MOTION TO SUPPRESS EVIDENCE
FOUND IN THE CAR AND STATEMENTS MADE
BY APPELLANT SINCE HE WAS NOT ILLEGALLY
DETAINED ON JANUARY 7, 1980.

Appellant concedes and the evidence supports the conclusion that appellant was not arrested on January 7, 1980. Officer Murry, testifying at the suppression hearing, indicated she had other officers who were keeping appellant under surveillance stop him and ask him to come to the police station for questioning. (R454) She specifically stated no directive was given to arrest appellant. (R454) Both Officers Leake and Stelljes testified appellant was told he was not under arrest. (R529, 533, 562) And appellant acknowledged same. (R539)

The question presented here is whether appellant voluntarily appeared at the police station or was his appearance the result of coercion. Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 60 L.Ed.2d 824 (1979), and United States v. Mendenhall, 446 U.S. 554, 100 S.Ct. 1870 64 L.Ed.2d 497 (1980)

Appellant testified after he was stopped by the officers, he was asked to produce his drivers' license, and upon request the officer would not return the license. (R539-540) He

Drug case
stop and
search

liberty
taken to
police
station
and not
not know

stated the officers did in fact ask him to come to the police station (R539), and he never indicated he would not go (R545). However, appellant also said he was not told the purpose for going to the station, and he was escorted to the station by no less than four marked and unmarked police cars. (R539-540) Appellant stated he went to the police station to get his license back. (R541, 544, 547)

The testimony of Officers Leake and Stelljes is contradictory in certain aspects. Both testified appellant was told the reason they wanted him to go to the station. Furthermore, appellant was told he did not have to come to the police station, although the officer stressed its importance. (R529, 533, 562) Officer Stelljes did ask to see appellant's license; however, appellant agreed to go to the station without anything further being said about the license. (R562-563) The officer had no recollection of appellant asking for the license back. (R563) And contrary to appellant's assertion of being "kind of boxed in", Officer Leake stated appellant followed a police cruiser to the station, and he and Stelljes followed in their respective unmarked vehicles. (R529-530)¹

1. This case is factually distinguishable from Dunaway. In Dunaway the petitioner was taken from a neighbor's house to a police car and transported to the police station. He was never told he was free to leave and would have been restrained had he attempted to go.

The Fourth District in State v. Grant, 392 So.2d 1362 (Fla. 4th DCA 1981), citing from Scheckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), indicated all the surrounding circumstances must be viewed to determine if a person has been detained or seized within the meaning of the Fourth Amendment. Some factors to consider would be the ^①threatening presence of several officer, ^②display of weapons, ^③some physical touching of the citizen and ^④use of language or tone of voice compelling compliance with the officer's request. Grant, at 1364-1365.

Sub judice, the evidence revealed two officers - Leake and Steiljes - actually approached appellant at his vehicle, although an officer in a marked car effectuated the stop. However, appellant voluntarily exited the car; he was not ordered out by the officers. No guns were drawn, nor was appellant handcuffed. (R544) Appellant was asked, not ordered, to come to the police station, and the officers made no threats. (R545) And there is no evidence of any physical touching by the officers. The officer specifically told appellant he did not have to come to the station. And once there, it was made clear to appellant he could leave at any time. And in fact appellant was allowed to leave when he indicated he wanted to. (R554, 556-557)

Since appellant and the officers gave contradictory testimony concerning the retention of the driver's license, the purpose for the request and the number of officers involved,

the Court was faced with a credibility determination. That question of credibility was obviously resolved in favor of the officers. As the Ninth Circuit said in United States v. Williams, 604 F.2d 1102 (8th Cir. 1979), "...implicit in the denial of the motion to suppress a finding by the trial court that, ..., appellant voluntarily accompanied the police." And here the trial court made a specific finding of voluntariness. (R580) This finding by the trial court is supported by the record and is not clearly erroneous and thus should not be disturbed on appeal. United States v. Johnson, 563 F.2d 936 (8th Cir. 1977)

ISSUE II

THE TRIAL COURT PROPERLY DENIED
APPELLANT'S MOTION TO SUPPRESS
EVIDENCE FOUND IN THE VEHICLE AS
THE POLICE HAD PROBABLE CAUSE TO
DETAIN THE VEHICLE

Appellee respectfully submits that the information available to the police officers and the "open view" observation of the stains and sand in the vehicle gave the police probable cause to seize appellant's car. Prior to appellant's arrival at the police station, the following facts were known to Detective Long:

- (1) Detective Long knew the police were investigating the homicide of a young female found at the beach on the early morning of January 3, 1980.
- (2) He had heard the tape wherein an anonymous caller indicated the license involved in the homicide was GMU 603.
- (3) Long was aware that a check of the vehicle registration revealed appellant was the owner of said vehicle.
- (4) A police check of appellant indicated appellant was on life parole for the homicide of a female in New York.
- (5) Detective Long also knew the prior murder was similar in a number of respects to the homicide under investigation, i.e. sexual overtones, both victims choked and battered and left nude.
- (6) Investigation at the crime scene indicated the victim had been murdered elsewhere and the body dragged to the water.

- (7) A barmaid at the ABC Lounge had positively identified appellant as the person the victim left the bar with on the night of January 2, 1980.

On the evening of January 7, 1980 Detective Long was in a place where he had a right to be and observed a vehicle, on a public street, which he knew was the subject of police investigation.

The viewing by Officer Long from outside of the vehicle into the inside was an "open view" observation as defined by the Supreme Court in Ensor v. State, ___ So.2d ___ (6/5/81 F.L.W. 374, Case No. 57,817, Opinion filed June 4, 1981) The Court in Ensor indicated if a officer sees contraband or evidence in "open view", he had probable cause to believe a crime has been or is being committed.

Sub judice, based on the factors listed above, coupled with the officer seeing sand (victim was found on a beach) and seeing what appeared to be dark blood stains (evidence at beach led police to believe the victim was killed elsewhere and transported to the beach), Officer Long has probable cause to seize the vehicle. The seizure of the vehicle comports with the dictates of Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975, 26 L.Ed.2d 419 (1970). In Chambers, the Supreme Court held given probable cause the officers could either seize the car until there has been judicial determination of probable cause (search warrant) or carry out an immediate search without a warrant. Accord United States v. Fultz, 622 F.2d 204 (6th Cir. 1980) and United States v. Brown, 635 F.2d 1207 (6th Cir. 1980).

Since the Chambers v. Maroney decision our Courts have recognized a less stringent standard than probable cause for seizure - detention - of personal property. The Seventh Circuit in United States v. Klein, 626 F.2d 22 (7th Cir. 1980) held the detention of personal property analogous to a Terry² detention of an individual; therefore, the applicable standard for such detention is reasonable suspicion. The Court based its ruling on the Supreme Court case of United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970)

In Van Leeuwen, supra., a postal clerk became suspicious after receiving two first-class packages, weighing twelve pounds, registered and insured for \$10,000.00. The packages were addressed to post-office boxes in Van Nuys, California and Nashville, Tennessee and the return address on each was a vacant housing area. Additionally, the person mailing the packages had been driving a car with a Canadian license. Based on these facts the Court upheld the detention of the packages pending further investigation and issuance of a search warrant. See also United States v. Goldstein, 626 F.2d 356 (5th Cir. 1981) and United States v. Viegas, 639 F.2d 42 (1st Cir. 1981) holding reasonable suspicion sufficient to detain personal property. See also Judge Hurley's concurring opinion in State v. Corey, 389 So.2d 1228 (Fla. 4th DCA 1980) which cited Van Leeuwen and Klein, supra.

2. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)

The trial court properly denied appellants Motion to Suppress the evidence found in the vehicle since the police had probable cause to detain the vehicle.

ISSUE III

THE TRIAL COURT DID NOT ERR IN DENYING
THE MOTION TO SUPPRESS THE STATEMENTS
MADE BY APPELLANT AFTER HE WAS ARRESTED
AND BOOKED

Although not cited by appellant, this case presents a direct, distinguishable contrast to the Supreme Court's most recent exposition on the scope of Miranda.³ Edwards v. Arizona, 29 Cr.L. 3037 (Decided May 18, 1981). The petitioner in Edwards was arrested and informed of his Miranda rights on January 19, 1976. He indicated he understood said rights and was willing to answer questions. Edwards was told he had been implicated by another suspect, but he denied any involvement and sought to make a deal. After being told by the police that they had no authority to negotiate, petitioner invoked his right to counsel, and the police ceased their questioning.

On the morning of January 20th two other detectives asked to see petitioner. Edwards said he did not want to talk with anyone but was told he had to. He was again informed of his rights and made a statement implicating himself. The trial court denied Edwards motion to suppress holding the statement was voluntary. On these facts the Supreme Court reversed holding a waiver of counsel must not only be voluntary but must also be a knowing and intelligent relinquishment

3/ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed.2d 694 (1966)

of a known right. Additionally, the court held in situations where a defendant expresses his right to deal with the police only through counsel, he is not subject to further questioning until counsel has been made available or the accused initiates further contact with the police.

This case is factual distinguishable from Edwards, supra. The petitioner in Edwards was told on the second day and subsequent to his request for counsel that he "had to talk" to the police officers. Sub judice, when given the opportunity appellant indicated his desire to talk. (R472-473). And in Edwards the defendant specifically said he wanted an attorney before he made a deal and said he did not want to see anyone when told the detectives were there to see him. Here appellant expressed an equivocal - I think - desire for an attorney.

Prior to the decision in Edwards, supra, and appellee submits that decision does not affect these holdings, it was clear that an invocation of the right to counsel was not a blanket prohibition against further interrogation. Michigan v. Moseley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) and Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979). The Fifth Circuit in Nash addressed those situations wherein a defendant makes an equivocal request for counsel. In such a situation officials may make further inquiry to clarify the suspects wishes. Blasingame v. Estelle, 604 F.2d 893 (5th Cir. 1979); United States v. Grullon, 496 F.Supp. 991 (U.S.D.C., E.P. Penn. 1979); Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980)

Sub judice, when appellant was arrested he was informed of his Miranda rights, and he stated he understood his rights. (R470) Detective Hitchcox handed Officer Murry a picture of decedent which was shown to appellant. (R470, 496) Appellant said the picture was Debbie and acknowledged he knew her. (R470-471, 496) At this point appellant said, "I think I want to talk to an attorney...." (R471) No further questions were asked, and appellant was taken to the police station for booking. (R471)

At booking Officers Murry and Hitchcox told appellant they would come up to the fourth floor after he was processed to give appellant the opportunity to talk to them and answer any questions he may have had. The officers indicated they would come if appellant wanted them to and he said he would be interested. (R472-473) Thus, we are faced with the situation contemplated by the court in Nash v. Estelle, supra. - A defendant expressing an equivocal desire for counsel, then exercising his prerogative to answer questions.⁴ As the court said in Nash, "Some persons are moved by the desire to unburden themselves to confessing their crimes to police, while others want to make their own assessment of what to say to their custodians." 597 F.2d. 513 at 517.

In Brewer v. Williams, 430 U.S. 337, 97 S.Ct. 1232, 51 L. Ed.2d 424 (1977) the Supreme Court indicated the question of

* 4/ It appears from the record, however, that the statements made by appellant after booking was not in response to questions proffered by the officers. During the attempt to re-read appellant's rights he responded with statements to the effect that his life was over and nothing he could do would "bring her back". (R473, 1847)

waiver of counsel was to be determined from the fact of each case. The standard to be applied in determining waiver is whether appellant intentionally abandoned or relinquished a known right or privilege. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) There can be no doubt that appellant knew and understood his right to counsel and intentionally relinquished same.

On January 7th, two days before appellant was actually arrested, appellant voluntarily went to the police station at the request of the police. Once there he was read and he executed a waiver of rights form which specifically included the right to counsel. (R457-459) And on the day of his arrest, appellant was again informed of his rights and said he understood them. (R469-470, 1845) Appellant emphatically stated he didn't want his rights read again. (R473) Appellant understood anything he said could be brought up in court, but he insisted he wanted to talk to the officers. (R474-476) And when appellant had said all he wanted to say, he told the officers, "I'm kind of tired and I think I want to talk to my attorney." (R477) It is obvious appellant understood his right to counsel and would invoke same whenever he wanted to terminate a conversation.

Even assuming, arguendo, the introduction of appellant's statements of January 9th was error, appellee submits the error was harmless. Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972). In Chapman v. California,

386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) the Supreme Court held the harmless error doctrine can be applied in situations involving the denial of a federal constitutional right. Both state and federal courts have applied the harmless error doctrine to the introduction of statements where the evidence adduced in the statement is cumulative of other and the other evidence of guilt is overwhelming. Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); Ashley v. State, 370 So.2d 1191 (Fla. 3d DCA 1979); and Hampton v. State, 386 So.2d 587 (Fla. 3d DCA 1980).

Sub judice, appellant's statements on January 9th are cumulative of other valid statements made on January 10th which were properly admitted.⁵ The following evidence of appellant's guilt was introduced at trial:

- (1) A barmaid at the ABC Lounge testified appellant left the bar with the murder victim the night before her body was discovered. (R1120)
- (2) The police had received an anonymous call giving a license number for the vehicle involved in the bay murder.
- (3) A registration check of the license numbers revealed appellant owned the vehicle.
- (4) On January 3, 1980 appellant went to work and asked for the day off; his employer noticed red marks or scratches on his face. (R1140)

5/ The propriety of appellant's January 10th statements is discussed in detail in Issue IV of this brief.

- (5) Appellant's employer also testified they had conversations concerning sex, more particularly anal sex, and appellant related he liked to slap or beat the women at these times.
(R1157-1158)
- (6) Defendant washed his car on the day following the murder. (R1251, 1259)
- (7) Blood stains were found in appellant's car of the same type as the victim. (R1475-1476)
- (8) Although appellant also has Blood Type A, certain enzymes in the blood matched that of the victim.
(R1475, 1478-1479)
- (9) Judith Bunker, an expert in blood stain patterns, testified the configuration of the blood stains in appellant's car indicated the victim was struck with a hard object while sitting in the passenger seat. (R1579, 1616, 1620)
- (10) A luminal test was used to determine that blood stains had at some point been on appellant's jacket and parts of the car but had been cleaned off. (R1544)
- (11) Three of the hair samples taken from the car of the accused, when microscopically examined, demonstrated the same hair characteristics as the victim.
(R1683)
- (12) Lynn Henson from the Department of Law Enforcement testified he compared fiber taken from the seat of

appellant's car to fiber found on the victim's pants and determined they were similar in every characteristic. (R1719-1720)

(13) Additionally, Henson compared fiber from the victim's coat to fiber sweepings found in appellant's car and found no characteristics which would eliminate the fiber from the car as have come from the coat. (R1720-1721)

(14) Appellant's cellmate testified concerning an incident in jail during which appellant stated, "I wonder how he'd like a Coke bottle up his ass like I gave her." (R1794)

(15) Appellant also told the same cellmate his boss was lying about appellant being scratched up because appellant was too scratched up to go to work. (R1787)

(16) When appellant was questioned at the police station on January 7th, he stated he did not know Debbie and knew nothing about a murder. (R1815)

(17) However, on January 9th when appellant was being transported to jail after his arrest, appellant viewed a picture of Debbie Kammerer; he indicated the picture was that of Debbie, and he acknowledged he knew her. (R1817-1818)

This evidence established appellant's guilt of the murder of Debbie Kammerer beyond a reasonable doubt. The jury would

have, based on the other evidence, convicted appellant without introducing these statements; thus, the use of the statements was harmless beyond a reasonable doubt. Milton v. Wainwright, supra.

ISSUE IV

THE TRIAL COURT DID NOT ERR IN
DENYING APPELLANT'S MOTION TO SUPPRESS
STATEMENTS MADE ON JANUARY 10th

Appellant contents, citing Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) and Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), his statements made on January 10th should have been excluded from evidence because his attorney had not been notified of the interview. This argument is without merit. Massiah involved a post-indictment situation wherein a co-defendant, who unknown to the defendant was cooperating with the police, surreptitious interrogated the defendant. The defendant had no knowledge he was under interrogation by a government agent. The Court in Escobedo recognized (citing Johnson v. Zerbst, supra.) a defendant may under proper circumstances effectively waive his right to counsel, but held on the facts before them no waiver occurred.⁶

Federal and State Courts have recognized, in cases after the Massiah decision, there is no per se violation of the Sixth

6. Escobedo had been arrested and unequivocally requested counsel, and he had been informed of his right to remain silent. The police told the defendant they had convincing evidence against him and urged him to make a statement.

Amendment when a defendant makes incriminating statements in the absence of counsel. United States v. Massey, 437 F.Supp. 843 (U.S.D.C., M.D., Fla. 1977) The Court held the question of waiver or Sixth Amendment violation depends on the facts and circumstances surrounding the interrogation. Likewise, the Seventh Circuit in United States v. Springer, 460 F.2d 1344 (7th Cir. 1972) held there is no per se rule that law enforcement officials must give prior notice to defense counsel before obtaining a statement from an accused. The Court said:

Springer would first have us affirm as a principle that *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), and subsequent cases have made it clear that law enforcement officials cannot procure a statement of any kind from a defendant who has an attorney without at least prior notice to, if not the consent of, the attorney. Although such a rule might seem to follow from a reading of *Massiah* alone, wherein the Court spoke in very broad terms in dicta, we are constrained by precedent both of this court and the Supreme Court to reject this line which admittedly has the value of simplicity in administration, as do all per se rules. That a constitutional right, such as the right to counsel, may be waived is not questioned. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). Thus, in *United States v. Fellabaum*, 408 F.2d 220 (7th Cir. 1969), cert. denied, 396 U.S. 858, 90 S.Ct. 125, 24 L.Ed.2d 109, and *United States v. Crisp*, 435 F.2d 354 (7th Cir. 1970), cert.

denied, 402 U.S. 947, 91 S.Ct. 1640, 29 L.Ed.2d 116 (1971), this court has affirmed convictions resulting from confessions obtained without the presence of counsel.

(text at 1350)

And in Monroe v. State, 369 So.2d 962 (Fla. 3d DCA 1979) the Third District said:

It does not follow that all statements made in the absence of counsel are inadmissible; but each case must turn on the facts and circumstances surrounding the particular interrogation. United States v. Brown, 551 F.2d 639, 643-4 (5th Cir. 1977). A valid interrogation of a defendant can take place out of the presence of his attorney where the defendant knowingly and intelligently waives his right to have counsel present at some particular critical stage of the proceedings, and further the presence of his counsel is not essential to the validity or effectiveness of that waiver, Johnson v. State, 268 So.2d 544, 546 (Fla. 3d DCA 1972), cert. discharged, 294 So.2d 69 (1974). The voluntariness of in-custody statements of persons accused of a crime and of the waiver of the right to counsel at an interrogation need only be established by a preponderance of the evidence. Johnson v. State, 294 So.2d 69 (Fla. 1974), *supra*.

(text at 964)

Thus the fact that counsel had been appointed for appellant and the police knew of the appointment before their meeting with appellant does not per se require suppression of the statement.

ISSUE V

THE TRIAL COURT DID NOT ER IN
DENYING APPELLANT'S MOTION TO
SUPPRESS STATEMENTS AS THE
STATEMENTS WERE MADE VOLUNTARILY

Appellee would point out that appellant never raised the issue of voluntariness of his statements; therefore, the issue has not been preserved for appellate review. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) In Wainwright the Court held that a trial court need not hold a hearing on voluntariness of statements and/or confessions unless the defendant objects on that bases. Accord United States v. Wertz, 492 F.Supp. 1027 (U.S.D.C., D.S.C. 1979). And our Supreme Court in Brewer v. State, 386 So.2d 232 (Fla. 1980) also indicated the Court need only determine if a statement was free and voluntary if a question on voluntariness arises. Additionally, appellant did not object when the trial court ruled the statements voluntary.

Appellant made three (3) pre-trial motions to suppress. The first motion pertained to statements made by appellant on January 7, 1980, and the basis for said motion was that the statements were the result of an illegal detention. (R307-309) The second motion pertained to physical evidence seized from appellant's vehicle and the results of tests done to the physical evidence. (R310-312) The third motion concerned the statements made by appellant on January 9th and 10th. The legal

arguments in support of this motion were: (1) appellant's arrest was a result of illegally seized evidence and the statements were "fruits of the poisonous tree", (2) the statements were obtained after appellant had requested counsel, and (3) the January 10th statement was obtained without the permission or knowledge of appellant's counsel. (R313-314)

After testimony was received at the hearing, defense counsel argued in support of his motions asserting the same grounds espoused in his motions. (R564-575) And the prosecutor likewise made no argument on the voluntariness of the statements. However, at the close of the arguments, the trial judge made a ruling that the statements were freely and voluntarily made. (R580) No objection was made to that ruling.

Prior to admission of the statements at trial, the following colloquy occurred between the parties:

MR. HELINGER: Your Honor, for time's sake I would inquire of the Court -- During the motion to suppress before Judge Patterson we went through the specifics; the Court found the statement freely and voluntarily made at that time.

Do you want me to go --

MR. SCHERBER: I think we have to go through all the statements as far as legal relevance. That's the only purpose for this proffer to my understanding.

THE COURT: No question of voluntariness?

MR. SCHERER: I think that has been permitted.

MR. WHITE: I believe, well, that during --
In fact, we know during the course of
our motion to suppress that previous judge
found as a matter of law that there was
voluntariness and Miranda rights, et cetra,
had been properly put to the defendant
before his questioning. Hence we are not
trying to create an error with the Court,
but it would be our opinion that that is
res adjudicata or whatever you call it.

MR. SCHERER: And that aspect need not be
looked into, but, very simply, I object
to him going back to statements which are
not relevant.

THE COURT: All right. (R1813-1814)

Again no objection was made to the evidence for lack of volun-
tariness; appellant's argument was confined to its relevancy.

Since appellant never objected to the admission of the
statements based on involuntariness, he cannot now be heard
on that issue. Wainwright v. Sykes, supra. Appellant had
two opportunities to impose any objection - when the trial
judge made his sua sponte ruling and again when the issue came
up during Detective Murry's proffered testimony.

Noting rationally during looking he, camera. (R472)
Did not appear under influence of drugs or alcohol. (R472)
None of what occurring (R472)
Not threatened or coerced.
Told anything he said could be used in court.
Did not press when apprehended.

ISSUE VI

THE TRIAL COURT'S ADMISSION OF EVIDENCE
OF MARIJUANA IN APPELLANT'S CAR IS NOT
REVERSIBLE ERROR

Appellee respectfully submits this Court's ruling in Malloy v. State, 382 So.2d 1190 (Fla. 1979) is dispositive of this issue. In Malloy co-defendants who had entered negotiated pleas, testified to an incident involving a rifle at a lounge which occurred some hours prior to the murders. This Court held the incident at the lounge was only one incident in a chain of events culminating with the delivery of the property to appellant's bedroom. The Court also said:

In addition, the circumstances of the lounge incident do not establish all the elements of a crime and, consequently, the question of the admissibility of prior criminal acts is not present.

Sub judice, during appellant's statements to the police, he indicated he had a problem with alcohol and also used marijuana. (R1848) Officer Ehlers testified concerning the items taken from appellant's car, which included several baggies of marijuana. (R1364) This was the only evidence introduced at trial concerning drugs, and as this Court said in Malloy, supra., this evidence does not establish all the elements of a crime; therefore, the question of other criminal acts does not arise.

The incident is a lengthy trial.

ISSUE VII

THE TRIAL COURT DID NOT ERR IN
ADMITTING EVIDENCE OF AN ATTEMPT-
ED HOMOSEXUAL ASSAULT BY APPELLANT
WHILE HE WAS IN JAIL AWAITING
TRIAL.

Joan Wood, a medical examiner for Pinellas County, testified to the presence of semen in the rectum of the victim. (R1037) Additionally, she testified there was evidence of mutilation of the rectum, suggesting penetration by a foreign object. (R1038-1039) The nature and extent of the rectal injuries were consistent with the type of injuries likely to be received from insertion of a coke bottle into the rectum. (R1039) A coke bottle was found in appellants' car.

The testimony of Kenneth Young, appellants' cellmate, was offered to introduce an admission made by appellant during his incarceration. See Darty v. State, 161 So. 2d 864 (Fla. DCA 1964). Appellant made the statement, "I wonder how he'd like a Coke bottle up his ass like I gave her." (R 1794)

At a motion in limine hearing concerning the admission into evidence of the statement, the court ruled:

THE COURT: Yeah, but I think it comes in under statement against interest. I think he has the right to show the facts that prompted that statement. If it contains the evidence of another crime, so be it. (R 871)

Thus the trial court held the statement was relevant as an admission against interest.

This Court said in Smith v. State, 365 So. 2d 704 (Fla. 1978) that Williams Rule evidence was admissible if relevant for any

purpose except to show bad character or criminal propensity. The medical evidence demonstrated the victim had been rectally assaulted with a foreign object consistent with a Coke bottle. Appellant during the course of an attempted assault in essence admits he used a Coke bottle on the murder victim. It is unreasonable to assume the jury could appreciate the significance of such a remark without knowing the context in which it was made. Was the jury to surmise that appellant out of the blue made reference to his sexual assault on Debbie Kammerer?

The trial court properly ruled the testimony of Young was admissible to establish the context in which appellants' admission was made. *cf.* Ruffin v. State, ____ So. 2d ____ (Fla. 1981, Case Nos. 55,684 and 56,741, Opinion filed March 26, 1981).

ISSUE VIII

NO REVERSIBLE ERROR HAS BE SHOWN BY
THE TRIAL COURTS FINDING THAT THE
MURDER WAS COMMITTED TO AVOID OR PRE-
VENT A LAWFUL ARREST.

The evidence before the jury in support of this aggravating circumstance is the type of "strong" evidence suggested in Riley v. State, 366 So. 2d 19 (Fla. 1979). The following evidence supports this finding:

- (1) The victim was sexually assaulted and battered prior to the murder.
- (2) Appellant was on life-time parole from a previous murder.
- (3) The evidence indicated the victim had been murdered elsewhere, and the body taken to the beach for disposal.
- (4) During appellants January 10th statement he indicated, " You do what you can to protect Bobby Waterhouse. No one wants to go to jail." (R 1854)

In Washington v. State, 362 So. 2d 658 (Fla. 1978) this Court considered as a factor in determining the murder was committed to avoid arrest that the defendant had hidden the body by burial in his back yard. And in Dobbert v. State, 375 So. 2d 1069 (Fla. 1979) this Court considered the fact that as long as the victim was alive she was living proof of the abuse he had inflicted on her body. Subjudice, we have the additional factors that appellant was on life-parole, which would have been revoked had his sexual abuse of the victim become known and that appellant said he had to protect Bobby Waterhouse from jail.

Appellee submits these circumstances affirmative demonstrate

the murder was committed to avoid arrest.

Even assuming, arguendo, the evidence was insufficient to support this aggravating factor, there were no mitigating circumstances found. And there are several well-founded aggravating circumstances. This Court has on numerous occasions held when there are no mitigating circumstances and good aggravating circumstances, imposition of the death penalty is appropriate. Elledge v. State, 346 So. 2d 998 (Fla. 1977); Washington v. State, supra.; and Antone v. State, 382 So. 2d 1205 (Fla. 1980).

ISSUE IX

THE EVIDENCE SUPPORTED A FINDING
THAT THE MURDER WAS HEINOUS,
ATROCIOUS OR CRUEL.

The medical examiner's description of the nature and extent of abuse to the victim's body was as follows:⁷ There were 30 lacerations and 36 bruises over the body which had been inflicted prior to her death. The rectum displayed evidence of mutilation by multiple tearing wounds. Scientific evidence indicated the victim had been anally assaulted with a penis and a foreign object. Based on the amount of hemorrhaging in the rectal area, the mutilation of the rectum occurred prior to the victim's death. The victim's right eye was bruised and blackened and there were multiple injuries to the face. A bloody tampon had been stuffed in Debbie's mouth in such a manner as to prevent her from crying out or screaming. A front tooth was missing and there was evidence indicating this had recently happened. The medical evidence also indicated the victim had been choked to such an extent as to cause hemorrhages in the eyes, lining of the voice box and muscles of the neck.

The prosecutor described the heinous, atrocious or cruel circumstances thusly:

7/A complete description of the injuries to Debbie Kammerer's body is contained in record pages 1036-1060.

It's hard to consider anything more. The strangulation to the point that the blood vessels burst in the eyes, the thirty lacerations to the head, the defense wounds. If you all remember, and it's not fun to go back and think about, but it's necessary that you do so, you saw her hands, the cuts, the bruises, and it's very, very easy, although not pleasant, to think about the fight that that ninety-pound woman must have put up that particular night when she knew the handwriting on the wall, when she knew what she was dealing with that night.

Cruel, was it? Cruel means designed to inflict a high degree of pain. Did Debbie Kammerer suffer that night? She wasn't dead until after she was dragged into the water. Did she suffer? The defense wounds themselves indicated that she was suffering tremendously. It's not one little thing there and then she'd be out cold. The woman had to have fought for an extended period of time. The physical evidence and the testimony of the medical examiner, Dr. Wood, indicate that beyond any reasonable doubt.

Cruel, utter indifference to or enjoyment of the suffering of others, pitiless. Is Robert Waterhouse pitiless? Absolutely. To mutilate sexually the way he did that woman, the choking, the thirty-six bruises, it's not just hitting her thirty times with an object. There's thirty-six more bruises, again all over the hands, such an indicating to you what a struggle took place. The inside of that car, the blood all over, splattering everywhere, indicates the force with which she was hit as she's struggling that night. She's alive during the whole incident until she's dragged into the water. Can there be any doubt in anyone's mind, more or less any reasonable doubt, that this crime was especially heinous, atrocious, or cruel? Absolutely that applies.

(R. 2282-2284).

The actions of Appellant certainly meet the definition of heinous - extremely wicked or shockingly evil - atrocious -

outrageously wicked and vile - and cruel - designed to inflict a high degree of pain - as outlined by this Court in State v. Dixon, 283 So.2d 1 (Fla. 1973). See also Dobbert v. State, supra.

The evidence in Halliwell v. State, 323 So.2d 557 (Fla. 1975) was that the victim was murdered then the body was mutilated. That situation is not applicable here. The medical examiner stated the wounds to Ms Kemmerer's body were inflicted prior to her death by drowning, and the defense wounds indicate the victim was conscious and aware of what was happening.

ISSUE X

THE TRIAL COURT DID NOT ERR IN
FINDING TWO AGGRAVATING FACTORS
BASED ON APPELLANT'S PRIOR MURDER
CONVICTION

Sub judice, the trial judge found as two aggravating factors that the murder was committed while Appellant was under a sentence of imprisonment, i.e. lifetime parole for second degree murder in New York and Appellant had previously been convicted of a felony involving force. This is the identical situation presented in Adams v. State, 341 So.2d 765 (Fla. 1976), and this Court gave no indication that this was improper.

Appellee submits Appellant has misapplied the concept of improper doubling. The decision in Provence v. State, 337 So. 2d 783 (Fla. 1976) more correctly indicates there is doubling when two aggravating circumstances necessarily flow from the same aspect of a defendant's conduct. Thus with a murder committed during a robbery there would always be two aggravating circumstances.

In this instance, the two aggravating factors would not necessarily be present simply because a person had been convicted of a previous forceful felony. A defendant could have been convicted of a forceful felony and completed his sentence prior to the felony presently being adjudicated.

ISSUE XI

THE FACT THAT THE MURDER WAS COMMITTED
DURING THE PERPETRATION OF A SEXUAL
BATTERY WAS PROPERLY FOUND TO BE AN
AGGRAVATING CIRCUMSTANCE.

Appellant has again misapplied the law as pronounced by this Court in a number of cases. The holding in State v. Pinder, 375 So. 2d 836 (Fla. 1979) was that in a felony murder situation a defendant could not receive a separate judgment and sentence for the murder and the underlying felony. Appellant herein seeks to extend that ruling to say that in any felony-murder scenario the underlying felony cannot be used as an aggravating circumstance. This is simply not the law in this state.

This Court has on numerous occasions held the felony-murder context a proper aggravating factor. Ford v. State, 374 So. 2d 496 (Fla. 1979); Smith v. State, supra.

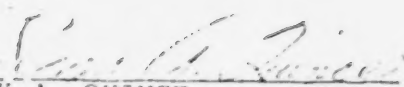
No error has been demonstrated.

CONCLUSION

Based on the foregoing arguments and authorities the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

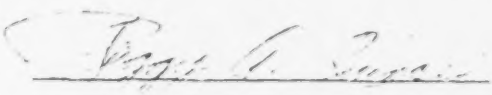
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Philip J. Padovano, Esquire, Post Office Box 873, Tallahassee, Florida 32302 on this 19th day of June, 1981.


Of Counsel for Appellee

IN THE SUPREME COURT OF FLORIDA

ROBERT BRIAN WATERHOUSE,

Appellant,

vs.

CASE NO. 59,765

STATE OF FLORIDA,

Appellee.

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

The Record on Appeal consists of twelve bound volumes and will be cited throughout this Brief by the letter "R" and the appropriate page number.

The Appellant, Robert Brian Waterhouse, will be referred to as the Defendant and the Appellee, State of Florida will be referred to as the State.

STATEMENT OF THE CASE

This is an Appeal from a Final Judgment of the Circuit Court for Pinellas County, Florida, adjudicating the Defendant guilty of the crime of First Degree Murder and sentencing him to die in the electric chair. (R-394).

On January 31, 1980, the Pinellas County Grand Jury met and returned an Indictment charging the Defendant with the premeditated killing of one Deborah Kammerer. (R-16,17). The charge alleged that on January 3, 1980, the Defendant beat and choked the victim inflicting wounds upon her, and that he then dragged her into the water where he left her to drown. (R-16, 17). A plea of Not Guilty was entered (R-16,35), and the case was set for trial.

Counsel for the Defendant made a variety of challenges to the constitutionality and constitutional applicability of the Florida capital punishment laws, (R-24,34) but each of the arguments was rejected by the Trial Court Judge. (R-80).

Prior to trial, the Attorneys for the Defense moved to suppress certain items of tangible evidence recovered from the Defendant's automobile on or after January 7, 1980, as well as a series of statements made by the Defendant to officers of the St. Petersburg Police Department on January 7th and 10th. (R-307-314).

The trial judge conducted a separate evidentiary hearing on the Motion to Suppress on August 22, 1980 (R-435,581) at the close of which he denied the Motion in part and granted it in part, ordering the exclusion of only the final statement made by the Defendant on January 10, 1980. (R-388,579,580) The State moved for a rehearing on the portion of the Order requiring the exclusion of the last statement (R-339,341) and on August 25, 1980, the Lower Court reversed its earlier ruling and entered an Order denying that part of the Motion as well. (R-411,412,432).

The Defense also filed a Motion in Limine seeking to exclude certain "Williams Rule" testimony regarding an allegedly similar act committed by the Defendant while he was incarcerated in the Pinellas County Jail. (R-305). The Court reserved ruling on this Motion until such time as the State offered the disputed testimony at trial. (R-872).

Trial commenced in St. Petersburg on August 25, 1980, and the tangible evidence and statements challenged by the Defense were presented to the Jury over the renewed objection of counsel. (R-991). The trial judge also allowed the State to present the similar fact evidence previously challenged by the Motion in Limine. (R-1753).

The presentation of the testimony and evidence relating to the first phase of the trial was concluded on August 31, 1980, and on September 2, following the arguments of counsel and instructions by the Court, the Jury returned a verdict of guilty as charged. (R-389). The sentencing phase of the trial began the next day, and after consideration of the testimony and argument relating to that proceeding, a majority of the jury recommended the imposition of the death penalty. (R-390).

A Defense request for a presentence investigation was denied (R-2300) and the Defendant was sentenced shortly after the advisory penalty proceedings. The trial court judge accepted the recommendation of the Jury and sentenced

the Defendant to death (R-2305). Thereafter, on September 15, 1980, the Court entered written findings of fact in support of the sentence. (R-408,409).

This appeal was timely filed on September 30, 1980, to review the Judgment and Sentence of the Circuit Court for Pinellas County, Florida. (R-417).

STATEMENT OF THE FACTS

A

THE MOTIONS TO SUPPRESS

On the morning of January 3, 1980, Sergeant Gail Murry responded to a call concerning the discovery of a body near the shoreline in the Lassing Park area of the city of St. Petersburg. (R-444). When she arrived at the scene, she found the naked body of a white female lying face down in the mud about twenty feet from the high tide mark. (R-445).

Sergeant Murry noticed that the victim had severe lacerations in the head and scalp area, and as she turned the body over, she discovered that the victim had numerous bruises around the throat area, a swollen black right eye, and what appeared to be a blood soaked tampon in her mouth. (R-445). An examination of the entire Park area led Murry and other officers called to the scene, to the conclusion that the assault had occurred elsewhere and that the body was transported to the scene and dragged into the water. (R-446).

On January 5, 1980, the St. Petersburg Police Department received an anonymous phone call from a person with a New England type accent who said "In reference to the bay murder, I have a license number for you GMU-603", and then hung up. (R-447). Sergeant Murry was able to determine from the information provided that the vehicle referred to was a brown 1973 Plymouth registered in the name of the Defendant Robert Brian Waterhouse.

(R-448).

A records check disclosed that the Defendant Waterhouse was on lifetime parole for the homicide of a white female victim in New York. (R-449). Sergeant Murry learned upon further investigation that the victim in that case had been choked and left nude. (R-449).

The officers were able to determine that the Defendant's local address was 1675 Pinellas Point South, and immediately commenced a surveillance of the residence and of the Defendant. (R-450). On January 7, 1980, while the police surveillance was apparently still in progress, a missing persons report demonstrated that the victim was one Deborah Kammerer who had lived on Grove Street in the city of St. Petersburg. (R-450).

Miss Kammerer was last seen by her friends, Yohan Wenz and Carol Byers, at the ABC Lounge on Fourth Street on the evening of January 2, 1980 (R-451). The three had gone to the lounge that night together, but Wenz and Byers left shortly before midnight. (R-451). Miss Kammerer indicated to them that she wanted to stay a little longer. (R-451).

The officers then proceeded to the ABC Lounge where they spoke with an oriental bartender named Kyoe Ginn. (R-452). They showed the bartender a photograph of Deborah Kammerer, and she said that she knew her as a patron of the lounge. (R-452). Ms. Ginn told the officers that Miss Kammerer was in the bar on the evening of January 2, 1980, and that she left with a man shortly after midnight. (R-452).

The bartender was then shown a group of photographs including the photograph of the Defendant Waterhouse, and she picked out the photograph of the Defendant and said that he was the man she saw leaving the lounge on January 2, 1980 with Miss Kammerer. (R-452). She recognized Waterhouse as a customer of the lounge as well. (R-452).

Sergeant Murry then decided to interview the Defendant's Aunt and Uncle,

Mr. and Mrs. Foster, and a family friend, Mr. Ken Norwood, each of whom lived in the same house with the Defendant. (R-453). She asked the three of them to come to the police station for questioning, and when they arrived, he noticed that they each had a New England accent similar to the accent of the voice on the tape of the anonymous phone call. (R-453).

The Fosters were described by Sergeant Murry as uncooperative. (R-454). They told her that they did not know what the Defendant Waterhouse was doing on the evening of January 2, 1980, and that he would generally just come and go as he pleased. (R-454). Mr. Norwood, however, told the officers that the Defendant was an oversexed person with a Jekyll and Hyde personality and that he felt that he was capable of committing a crime such as the one which was committed. (R-454).

At this point, the officers decided that they would ask Mr. Waterhouse to come to the police station for questioning. (R-455). On the evening of January 7, 1980, Detective William Leake and Detective Richard Stelljes, both of the St. Petersburg Police Department, observed the Defendant driving his 1973 Plymouth in the vicinity of Twentieth Avenue and Sixteenth Street North. (R-528). They signaled for him to pull over to the side of the road so that they could speak with him. (R-528).

Detective Leake testified that Detective Stelljes asked the Defendant Waterhouse for his driver's license, which he produced and that he then told him they were investigating a homicide and that they would like for him to come down to the police station. (R-529). As it was related by the officer, the Defendant was told that it was important that he come down to the station, but that he did not have to. (R-529, 530). According to Detective Leake, the Defendant Waterhouse followed them down to the police station voluntarily. (R-530). He reportedly followed Detective Stelljes, driving in his own car alone, while Detective Leake rode back in another police car which had arrived at the

scene in the meantime. (R-530).

Mr. Waterhouse, who took the witness stand on his own behalf at the hearing on the Motion to Suppress, testified that the only reason he followed the officers to the station was that they did not give him his driver's license back. (R-540). He said that he asked the officer to give him his license back at the scene of the stop and that the officer said "Well, you will have to go to the police station to get it back." (R-540).

The Defendant testified that there were at least four police cars that accompanied him to the police station and that he was boxed in among the cars. (R-540). After he arrived at the station, and spoke with the officers there, they would not give him the license or his car. (R-541, 542). He said that he would not have gone to the police station if it were not for the fact that the officers had his license. (R-542).

The Defendant's testimony regarding the license is supported in part by the testimony of both Detective Leake and Detective Stelljes. Detective Stelljes, called in rebuttal by the State, testified that Mr. Waterhouse never asked him for his license back. (R-453). However, Stelljes was not asked (nor did he volunteer) to give testimony that he actually gave the license back. Moreover, Detective Leake testified that he did not observe Detective Stelljes giving the license back at the scene of the stop. (R-533).

Sergeant Murry told the Court that when the Defendant arrived at the station she advised him of his rights and he executed a written waiver. (R-456-459). At that time, he denied commission of the offense and said that he did not know Deborah Kammerer. (R-1815). The officer said that she told Waterhouse that he was free to leave at any time. (R-460, 461). In response to that he indicated to her that he wanted to leave and was permitted to do so. (R-461). The officers conceded, however, that they did not allow him to take his vehicle with him. (R-462).

While the Defendant was talking to Sergeant Murry, Detective John W. Long was conducting a visual inspection of the 1973 Plymouth from the outside. (R-511). He looked into the vehicle with a flashlight and observed some sand on the floor in front of the driver's seat and what appeared to be several dark stains on the floor directly behind the driver's seat. (R-512). Based upon this information, he applied for and obtained a search warrant to search the vehicle. (R-513,514). The automobile was detained by the police, against the Defendant's will, (R-489) continuously from the time he appeared at the station until the search warrant was actually signed at five a.m. on the morning of January 8, 1980. (R-513,514).

The search of the automobile disclosed that it contained blood stains of type A blood, the same type as the blood of Deborah Kammerer. (R-466,467). Based upon that information, police officers obtained an arrest warrant for the Defendant on the afternoon of January 8, 1980 and arrested him the next day. (R-466,467).

Sergeant Murry and Detective Hitchcox, who made the arrest, advised the Defendant of his rights in the police cruiser on the way to the station and when they asked him if he wished to speak to them he gave no answer. (R-470). They drove for a few minutes, after which Detective Hitchcox held up a picture of Deborah Kammerer and asked the Defendant if he knew her. (R-470). According to Sergeant Murry, he said "Yes that's Debbie", to which she responded, "Oh well, then you do know her." (R-470,471). Detective Hitchcox said, referring to the earlier interview, "We were right, weren't we, about what happened Wednesday night?", to which the Defendant simply said, "Might." (R-471). Following these brief conversations, Mr. Waterhouse was reported to have said, "I think I want to talk to an attorney before I say anything else." (R-471).

During the booking, the officers indicated that they wanted to speak with

the Defendant in more detail a little later, and he seemed to them to be cooperative and interested. (R-472). The following morning, on January 10, 1980, at two a.m., Sergeant Murry and Detective Hitchcox went to the fourth floor of the jail to speak with him. (R-473). They said that he appeared to be saddened and that when they attempted to read him his rights again, he said that he didn't want his rights, that it was over, and that he was going to the chair. (R-473).

Sergeant Murry said that the Defendant was getting "very upset" and saying in response to the rights form, "I don't want to hear them - my life is over." During the several hours the officers were there, the Defendant would at times start crying and he told the officers that he wanted to talk to them as people and not as police officers. (R-473). He finally said, "You know I'm tired, and I think that I would like to talk with my lawyer, will you all come back later tomorrow", and the interview was ended. (R-477).

The following morning, the Defendant went to an advisory hearing, after which he was interviewed for several hours by a representative from the Public Defender's office. (R-478). The police officers knew the Public Defender's office had been appointed on the case, and that a representative of the office had conferred at length with the Defendant around noon of January 10, 1980, but went to see him later that afternoon¹, without contacting anyone in the Public Defender's office. (R-499,500).

During that interview, the Defendant told the officers that he did not want to confess, (R-479) and that he did not want to talk about the offense (R-500,501), and once again told them that he just wanted to talk to them as

¹ Sergeant Murry, during direct examination, said that this interview occurred on January 11, 1980, see e.g. R 479,489), but it is apparent from the cross examination during the Motion to Suppress (R-501,502) and the trial testimony (R-1819) that the interview actually occurred on the 10th.

people. (R-479). He was described as being "very upset", (R-480) and "paranoid", (R-481), but he nevertheless spoke with the officers.

The Defendant told the officer that he really liked sex, and that he had a problem with violence, explaining that when he drank too much, he found himself doing things he had no control over. (R-507,1821). He indicated to the officers that he had a very large sex drive, and that he liked sex any way he could get it, anal, oral, or vaginal. (R-1821). He said that sometimes he would get excited and if he found out the girl was "cursed" he would get frustrated. (R-1822,1823). When the officers asked when this problem had shown itself, he said that it had occurred Wednesday night, (apparently referring to the date of the offense), (R-1823) and later said "Why do you think I have quit drinking since Wednesday night?" (R-1824). When the officers inquired further, he reportedly said "Well, nobody wants to go to jail and you do what you have to do to protect Bobby Waterhouse." (R-1825,1826).

Thereafter, the Defendant's trial counsel directly advised the officers that they were not permitted to conduct any further interviews with his client. (R-481,502).

B

THE TRIAL

In the early morning hours of January 3, 1980, Glen Shine, a clerk at the Veteran's Administration, was walking his dog along the waterfront in the Lassing Park area of St. Petersburg. (R-903-906). As the dog began to bark, Shine noticed that there was an apparently lifeless body floating face-down in the water. (R-906).

Mr. Shine summoned the assistance of an older gentleman hitting golfballs

in a nearby park, and the two agreed that they should immediately call the police. (R-906-907). Mr. Shine took his dog back to the apartment while the older man made the phone call, and then returned to the scene to wait for the police to arrive. (R-907).

Officer LeRoy M. Pierce, of the St. Petersburg Police Department, responded to the call at approximately 9:00 a.m., and proceeded to the Lassing Park area. (R-913). When he determined that the body had no life-signs, he moved everyone back from the scene and roped off the entire area. (R-915).

Sergeant Gail Murry and Identification Technician, Elmer Krysko, arrived at the scene shortly thereafter. (R-929,967). Technician Krysko, who took photographs and processed the crime scene for evidence, (R-931-937) discovered various items of clothing scattered over a wide area near the scene. (R-929, 949). Sergeant Murry confirmed that the testimony of the other two officers that there appeared to be drag marks in the sand near the high tide mark. (R-953).

Dr. Joan Wood, the Deputy Chief Medical Examiner for Pinellas County, testified that the victim died as a result of drowning some eight to twelve hours before the first examination of the body at 11:45 a.m. on the morning of January 3, 1980. (R-1035). The victim had approximately thirty-six bruises and lacerations each of which occurred prior to the time of death. (R-1036). No abnormalities were found in the examination of the vagina, but Dr. Wood found evidence strongly suggestive of the presence of semen in the rectum. (R-1037). The injuries found in the rectum suggested the insertion of some object other than a male penis. (R-1039). In response to a hypothetical question posed by the prosecutor, Dr. Wood testified that the rectal injury could have been caused by the insertion of a foreign object the size and consistency of a coke bottle. (R-1039,1040).

Blood tests conducted during the autopsy revealed that the victim had

type A blood. (R-1040). The vaginal swab demonstrated the presence of only blood type A, but the biomedical examination of the rectal area revealed substances indicating the presence of both blood types A and B. (R-1040). Dr. Wood explained that the presence of blood type B in the rectum could have been caused by the semen of a male subject commonly classified as a "secreter", or that the substances could have appeared for some other reason. (R-1042). Finally, Dr. Wood testified that the injury to the rectum occurred prior to death, (R-1056) and that the victim could not have been conscious when she was dragged into the water. (R-1060).

Police officers first learned that the body examined by Dr. Wood was that of the victim Deborah Kammerer on January 7, 1980, after providing photographs to the news media, and reviewing missing persons reports. (R-975, 976). The known fingerprints of the victim were then compared to the latent fingerprints found in the apartment of Deborah Kammerer on Grove Street, in St. Petersburg, and were found to match. (R-1375).

Miss Kammerer was last seen by her friends Yohan Wenz and Carol Byers at the ABC Lounge on Fourth Street on the evening of January 2, 1980. (R-1078-1084) The three had gone to the lounge that night together, at Deborah's invitation, but Wenz and Byers left shortly before midnight. (R-1083,1094). Miss Kammerer told them that she wanted to stay a little longer, and that she would get a ride home with someone else. (R-1084).

Ms. Kyoe Ginn, the bartender at the ABC Lounge, testified that she knew both the victim and the Defendant as regular customers of the lounge. (R-1114,1116). She said that on the evening of January 2, she noticed that they were both in the bar alone after Wenz and Byers left, and that Miss Kammerer moved her chair over to where the Defendant was sitting. (R-1119). After about thirty minutes, she observed them leaving the lounge together. (R-1120). Ms. Ginn further testified that she saw the Defendant in

the lounge several days later drinking a straight orange juice and that she considered that unusual because she had never seen him order a non alcoholic drink. (R-1121).

Mr. Robert Lewis Van Vuren, the Defendant's supervisor at the R.J. Logget Plastering and Drywall Company, testified that the Defendant came to work on the morning of January 3, 1980, and asked if he could have the day off, explaining that he was "feeling rough". (R-1138-1140). At that time, Van Vuren noticed that the Defendant had red marks or scratches on each side of his face. (R-1140)

Mr. Van Vuren testified that he saw the Defendant again on January 7, 1980 and at that time, he appeared to have a little makeup on his face. (R-1143). He also noticed that the Defendant had new seatcovers in his car. (R-1143). Finally, Van Vanuren was allowed to testify that he had at certain times had conversations with the Defendant about sex and that the Defendant told him that he liked anal sex, and that he liked to beat or slap women when he did that. (R-1157,1158).

The Defendant's Aunt, Lois Foster, testified that the Defendant lived with her, but that she did not know his whereabouts between 11:00 p.m. on the evening of January 2, 1980 and 9:30 a.m. on the morning of January 3, 1980. (R-1248). She said that the Defendant stayed home from work on January 3, because he was not feeling well, but she did not notice any bruises on his face. (R-1249,1254). About 2:30 on the afternoon of January 3rd, she observed the Defendant washing his car, but she did not consider that unusual. (R-151,1251). Mr. Kenneth Norwood, a family friend who lived with the Fosters, testified that the Defendant had washed his car on that afternoon. (R-1259).

The State called both the boyfriend of the victim, Gary S. Colvin, and the girlfriend of the Defendant, Sherry Rivers. (R-1265,1281). Colvin testified that he was familiar with the sexual preferences of Deborah Kammerer and

that she had a distinct dislike for anal intercourse. (R-1271). Rivers, who had been dating the Defendant for about three months prior to the incident, was allowed to testify that the Defendant had in the past stated a preference for anal intercourse, and that she had anal intercourse with him on more than one occasion. (R-1319).

Wilbur Ehlers, a crime scene technician for the St. Petersburg Police Department was called to the stand to identify various items of evidence taken from the Defendant's car. (R-1322). This testimony related principally to the taking of blood, hair and fiber samples, but Ehlers was permitted to testify that he also found ten baggies of marijuana in the glove compartment. (R-1365).

Various expert witnesses were called to give testimony relating to the analyses of the blood stains. David Baer, a crime laboratory analyst in serology testified that the type A blood found in the Defendant's car was similar to that of the blood of the victim. (R-1460-1502). Baer maintained that although the Defendant also had type A blood, the enzymes in the samples were similar to those of the type A blood of the victim. (R-1475). Theodore Yeshion, of the forensic serology section of the Tampa Regional Crime Lab, testified that through the use of a "luminol" test he was able to determine that blood once existed on the Defendant's jacket, and in various parts of his car, but was cleaned off or wiped off. (R-1544). Finally, Judith Bunker, the assistant to the Medical Examiner in Orlando, was qualified as an expert in blood stain patterns and gave her opinion from the configuration of the stains that the victim was struck with a hard object while seated in the right front passenger seat of the vehicle. (R-1579, 1616, 1620).

The State also called several microanalysts. Patricia Lasko of the Florida Department of Law Enforcement testified that a hair sample found in the Defendant's car was similar to that of the known head hair of the victim. (R-1685).

Lynn Henson, of the same Department, testified that fiber materials obtained in the vacuum sweepings of the Defendant's car were similar to the fiber materials found in the victim's coat and the victim's pants. (R-1720,1721).

Kenneth Young, an inmate who shared a cell with the Defendant while he was awaiting trial, was allowed to testify as to an incident relating to the Defendant and another inmate. According to Young, a very small, slender individual named Robert Clark came into the cell and the others were teasing him and telling him how cute he was. (R-1788,1789). The Defendant put a shank (jailhouse knife carved out of a spoon) up to Clark's neck and said "how about some of the poop-chute", and thereafter cleared everyone else out of the area. (R-1791,1792). Young said that he could hear Clark protesting, and that when the Defendant walked around to where the other inmates were, his fly was unzipped and his shirt was untucked. (R-1794). At this time, according to Young, the Defendant was alleged to have said "I wonder how he would like a coke bottle up his ass like I gave her." (R-1794).

Inmate Young also testified to a prior conversation he had with the Defendant concerning the testimony of Mr. Van Vuren. As Young related the conversation the Defendant said, "They say that my boss is going to say that I came to work all scratched up - I didn't even go into work - that lying son of a bitch - I got to scratched up." (R-1787).

Sergeant Murry was then recalled to the stand to relate the Defendant's pretrial statements to the Jury. She recounted the substance of each of the statements as previously described in the portion of this brief relating to the Motion to Suppress. (R-1836,1865). Detective Hitchcox gave similar testimony relating to the statements. (R-1865,1888).

The Defense called, among other witnesses, Leon Vasquez, the bouncer who was working at the ABC Lounge on the evening of January 2, 1980. (R-1928). He said that he had a conversation with Miss Kammerer on the night of

the offense, regarding a man who was bothering her in the bar. (R-1931). He also observed the Defendant Waterhouse in the bar that night having a conversation with one Steve Spitzig about the purchase of some marijuana. (R-1940). Mr. Vasquez testified that Waterhouse and Spitzig left the bar at about ten minutes to twelve, and that Spitzig came back alone at approximately quarter to one. (R-1943). The victim was still in the bar when Spitzig returned. (R-1943). Finally, Vasquez told the jury that he explained these facts to Detective Hitchcox who said that he did not want to investigate the matter further because he did not want to help the defense. (R-1949).

In rebuttal, Robert W. Long of the St. Petersburg Police Department said that Mr. Vasquez told the police that the Defendant was speaking to the victim on the night in question. (R-2000). Other police witnesses testified that there would be no way for an identification checker standing in the hallway of the ABC Lounge to see the activity inside the bar, (R-2011), and that the officers had, after investigation, eliminated the unruly bar patron as a suspect. (R-2003).

C

THE PENALTY PHASE

The State introduced a certified copy of the Defendant's previous conviction for murder in New York (R-2254), and called Officer Lawrence L. Hawes, formerly of the Long Island Police Department, to explain the circumstances of that case. Mr. Hawes testified that the victim in that case, a seventy seven year old white female named Ella Mae Carter, was found dead lying naked in the bed of her residence. (R-2256, 2258). The crime scene investigation revealed blood leading from the hallway to the bedroom as well as on the bed itself, and it was apparent to the officer that the victim had tearing wounds near

the vaginal area and a bite mark on her breast. (R-2258).

The Defense recalled the Defendant's Aunt, Mrs. Lois Foster, who had taken care of the Defendant from the time he was six years old. (R-2269). She testified that the Defendant had been reaching out for help for the last fifteen years but the authorities in New York and Florida would not listen. (R-2227). It was Mrs. Foster's opinion that if the Defendant did commit the crime, it was because there was something mentally wrong with him. (R-2270).

ARGUMENT

A

THE MOTION TO SUPPRESS

POINT ONE

THE STATEMENTS OF THE DEFENDANT
AND THE TANGIBLE EVIDENCE TAKEN
FROM HIS CAR SHOULD HAVE BEEN
EXCLUDED FROM EVIDENCE ON THE
GROUND THAT THEY WERE OBTAINED
AS A RESULT OF AN ILLEGAL ARREST
OR DETENTION.

The first argument relating to the various search and seizure issues presented by this case is that the Defendant's January 7, 1980 trip to the St. Petersburg Police Department was an involuntary detention made without probable cause. It is respectfully submitted that the tangible evidence obtained from the vehicle and the two statements made on January 10 were the product of that unlawful detention and that they should therefore, have been excluded under the principles set forth in Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

It is conceded that the Defendant was not actually arrested on January

7, 1980, but that has no effect upon the argument which follows. The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. Davis v. Mississippi, 394 U.S. 721, 22 L.Ed.2d 676, 89 S.Ct. 1394 (1969), Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968), and United States v. Brignoni Ponce, 422 U.S. 873, 45 L.Ed.2d 607, 95 S.Ct. 2574 (1975). The critical inquiry relates only to the question of whether the Defendant's appearance at the Police Station was voluntary, or whether the Police Officers otherwise had probable cause for the detention.

The Officers characterized the Defendant's appearance at the Police Station as "voluntary" but that characterization is not supported by the objective facts presented at the hearing on the Motions to Suppress. The United States Supreme Court recently held in Dunaway v. New York, 442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979), that a detention for custodial interrogation regardless of its label intrudes so severely on interests protected by the Fourth Amendment as necessarily trigger the traditional safeguards against illegal arrests. Id at 442 U.S. 216.

In the Dunaway case, an informant told the police that a certain person may have been involved in killing the proprietor of a pizza store. Armed with this information, the officers brought the suspect into the station for questioning. Based upon this detention, without formal arrest or probable cause, a statement was given. The Defendant was given a full set of Miranda warnings, but the Court held that the warnings could not validate the statements produced as a result of the illegal detention. In reversing the conviction obtained by the use of the statement, the Court distinguished all of the exceptions to the probable cause requirement and ruled that a trip to the police station for questioning is an intrusion which requires probable cause.

The only arguable distinction between this case and Dunaway is that in

this case, the police officers said that the Defendant was free to go. That is an illusory distinction however, given the fact that the evidence demonstrates that they lured him to the police station by retaining his driver's license, and the fact that they seized his car as soon as he arrived.

The issue of whether a particular detention is voluntary or involuntary is not to be made upon the characterization of the police, but rather upon the manner in which it reasonably appears to the person arrested. State v. Frost, 374 So.2d 593 (Fla. 3d DCA 1979). In the Frost case, two police officers working at the Miami International Airport detained the Defendant under circumstances which indicated to them that he was a possible drug courier. An alleged consensual search of his briefcase and suitcases revealing marijuana was held to be invalid because the officers had kept the Defendant's airplane ticket and driver's license during the period of the alleged voluntary questioning. In referring to the retention of the plane ticket and driver's license, the Court said "It is totally unrealistic, and therefore totally unacceptable... to suggest that [the Defendant's] consent was an entirely voluntary and cooperative one when influenced by a real and effective restraint placed upon him by the officers." *id* at 597.

In this case, as in Frost, the police officers effectively restrained the Defendant by depriving him of his means of transportation and by refusing to give him back his personal identification. The fact that they told him he was free to go at any time is but a meaningless gesture, obviously designed to lend credence to the theory that the station house questioning was "voluntary". Of course, the vehicle itself, from which the objectionable evidence was obtained, was seized as a direct result of the Defendant's "voluntary" appearance.

An involuntary detention might have been proper upon probable cause, see Dunaway v. New York, *supra*, but it is clear from the facts of this case,

that the police officers did not have probable cause at the time of the January 7, 1980 questioning session.

When the police officers received an anonymous call simply stating, "In reference to the bay murder, I have a license number for you GMU 603", (R-447) and learned that the vehicle referred to was registered in the name of the Defendant, a man with a prior record who had been seen on January 2, 1980 with the victim, they decided to call him in for questioning. The innocent circumstances do not lend sufficient support to the anonymous tip to make it rise to the level of probable cause.

While it is clear that an anonymous tip may be sufficient to justify the commencement of an investigation, Interest of G.A.R., 387 So.2d 404 (Fla. 4th DCA 1980), In re: Bertrand, 303 A.2d 486 (Pa. 1973) they are generally not sufficient to constitute probable cause for an arrest. State v. Hetland, 366 So.2d 831 (Fla. 2d DCA 1979).

In Commonwealth v. Brooks, 364 A.2d 652 (Pa. 1976), an anonymous caller simply told the police that "Brooks from Baltimore was one of the persons responsible for this shooting." The Court held that the tip was insufficient to constitute probable cause because there was no showing that the caller had personal knowledge of the contents of the call. Likewise, in this case, there is no indication whatever that the anonymous caller had any firsthand information regarding the contents of the call. Nor, was the information contained in the call specific enough to bear the indicia of reliability, State v. Hetland, supra.

These decisions demonstrate from a purely legal standpoint the fact that police officers did not have probable cause to arrest the Defendant on January 7, 1980. That conclusion however, is supported by the actions of the officers themselves, as they certainly would not have allowed him to go home on that day, with or without his car, if they thought they had probable cause to arrest him.

The examination of the Defendant's vehicle from the outside, and the subsequent search of the vehicle, were obviously the direct product of the illegal detention. The record clearly demonstrates that the observations from the exterior of the vehicle made by a police officer while the Defendant was being questioned by Sergeant Murry, were the cause of the subsequent detention and search of the interior of the vehicle.

The Defendant respectfully submits further, the two statements made on January 10, 1980 were the direct product of the illegal detention. In this case, as in Clewis v. Texas, 386 U.S. 707, 18 L.Ed.2d 423, 87 S.Ct. 1338 (1967), there was no "break in the stream of events" between the unlawful detention and the making of the statements. The Defendant in this case did not voluntarily return several days after the involuntary detention to make a statement, as the Defendant Wong Sun did in Wong Sun v. United States, supra. Rather, it appears that information obtained during the detention was used to support a finding of probable cause for the actual arrest.

For each of these reasons, the Defendant respectfully submits that all of the evidence obtained from him or from his vehicle subsequent to the Police questioning on January 7, 1980 should have been suppressed by the trial judge.

POINT TWO

THE TANGIBLE OBJECTS TAKEN FROM THE DEFENDANT'S CAR SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE ON THE GROUND THAT THE POLICE OFFICERS LACKED PROBABLE CAUSE TO SEIZE THE VEHICLE PRIOR TO THE TIME THEY OBTAINED A WARRANT TO SEARCH ITS CONTENTS.

While the Defendant was talking to Sergeant Murry on January 7, 1980, Detective John W. Long was examining the 1973 Plymouth automobile by looking into the vehicle with a flashlight. (R-511). Based upon the observation of

some sand on the floor in front of the driver's seat and what appeared to be several dark stains on the floor directly behind the driver's seat (R-513), the officers decided to impound the vehicle and apply for a warrant to search its contents. (R-513,514). The Defendant respectfully submits that the seizure of the vehicle prior to the time the search warrant was obtained was improper.

The invasion of Defendant's privacy occasioned by the warrantless seizure of the vehicle was no less than that which would have occurred if the police had searched the entire vehicle without getting a warrant at all. That principle of law was clearly established in the landmark decision of the United States Supreme Court in Chambers v. Maroney, 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970) wherein the Court stated:

"...for constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant." 399 U.S. at 52.

The Court went on to say that either course would be reasonable assuming the existence of probable cause to conduct the search.

The Chambers decision clearly establishes that the police officers in this case did not improve their position by obtaining a warrant to search the vehicle. The involuntary detention of the vehicle, admittedly against the Defendant's will (R-489) was in legal effect "a warrantless seizure" which must be tested by Fourth Amendment standards from the moment it occurred.

The examination of the exterior of the vehicle was not a violation of the Defendant's reasonable expectation of privacy, Cardwell v. Lewis, 417 U.S. 583, 41 L.Ed.2d 325, 94 S.Ct. 2464 (1974), and therefore did not in and of itself constitute a violation of the Defendant's constitutional rights. However, the examination did not reveal any evidence which could constitute probable cause to seize the vehicle without a warrant.

The decision of this Court in Riley v. State, 263 So.2d 200 (Fla. 1972) provides a good illustration of the quantum of evidence which would be necessary to support a finding of probable cause in a case such as this. In that case, two young boys accidentally came upon a man who was apparently shooting at something in the back seat of a blue Chrysler which proved to be registered in the name of the Defendant. Several days later, police officers in Michigan arrested the Defendant on an unrelated charge and discovered, upon a brief examination of the exterior of the blue Chrysler, that it had a bullet hole in the side, a rifle in plain view on the floor, blood-like dark red stains on the back seat, and flesh particles on the rear seat and rear window. These facts were held to constitute probable cause to impound the automobile.

Officer Long's observation of a little sand on the floorboard in front of the driver's seat could certainly not be considered unusual in a coastal city such as St. Petersburg. The apparent immateriality of this observation was later verified by the State's geologist who could not testify that the particles of sand were similar to those found near the bayfront crime scene. (R-1665). Officer Long conceded that he observed an open coke bottle on the floor of the vehicle at the time he looked into it with a flashlight and that he could not determine the nature of the stain he observed from outside the vehicle. (R-521, 523). The apparent insignificance of these observations was later demonstrated by the fact that one of the stains the officer observed was actually a Coca-cola stain. (R-521).

Perhaps the most telling fact in support of the argument that the police did not have probable cause to seize the vehicle on January 7, is that they declined to arrest the Defendant at that time and place. Obviously, they themselves did not believe they had probable cause to seize the automobile, for if they did, they would have also used it to arrest the Defendant. It is firmly established in the law that probable cause to conduct a search is the same as

that which would be required to make an arrest. See Draper v. United States, 358 U.S. 307, 3 L.Ed.2d 327, 79 S.Ct. 329 (1959).

The cases upholding the impoundment of warrantless seizure of a vehicle upon probable cause universally involve factual situations wherein there was also probable cause to arrest the defendant. See e.g. Cooper v. California, 386 U.S. 58, 17 L.Ed.2d 730, 87 S.Ct. 788 (1967), Cady v. Dombrowski, 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523 (1973), Chambers v. Maroney, supra, Cardwell v. Lewis, supra, and Texas v. White, 423 U.S. 67, 46 L.Ed.2d 209, 96 S.Ct. 304 (1975). In this case, the police officers allowed the Defendant to go home, apparently on the assumption that the facts were insufficient to constitute probable cause to search it.

For each of the foregoing reasons, the Defendant respectfully submits that the warrantless seizure of the vehicle preceding the warrant authorizing search of its contents was invalid. The tangible objects obtained from the car should not, therefore, have been admitted into evidence.

POINT THREE

THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THE OFFICERS FAILED TO TERMINATE THEIR QUESTIONING AFTER THE DEFENDANT EXPRESSED HIS INTENTION TO REMAIN SILENT.

In the case before the Court, the police officers resumed questioning on several occasions after the Defendant indicated that he intended to remain silent. It is respectfully submitted that the statements produced by the renewed police interrogation, under these circumstances, should have been excluded from the evidence presented at trial.

The continuation of police questioning of an individual who has expressed

his intention to remain silent is clearly prohibited by Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966). In that case, the Court instructed that:

"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point, he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing the statement after the privilege has been once invoked..." 384 U.S. at 473,474. (Emphasis supplied)

Some Courts and commentators have incorrectly assumed that the foregoing admonition contained in the Miranda decision was diminished by the subsequent decision of the Court in Michigan v. Mosley, 423 U.S. 96, 46 L.Ed. 2d 313, 96 S.Ct. 321 (1975). That decision however, permits a resumption of police interrogation only under the limited circumstances wherein a fresh set of Miranda warnings are given, and the questioning does not relate to the matter which was the subject of the Defendant's earlier refusal to speak. The Mosley decision would not authorize the resumed questioning in this case, for the police officers persisted in asking the Defendant questions about the same homicide, in the face of several clear indications that he did not wish to speak to them.

The limitations upon the decision of the Court in Michigan v. Mosley were illustrated in United States v. Clayton, 407 F.Supp. 204 (E.D. Wis. 1976) and United States v. Jakakas, 423 F.Supp. 564 (E.D.N.Y. 1976). The Court in Clayton pointed out that the holding in Michigan v. Mosley is limited to the facts of that case and noted:

"It has been correctly pointed out that no indication is given [in Miranda] of what circumstances, if any, permit a resumption of questioning. Michigan v. Mosley, 423 U.S. at 98, 96 S.Ct. at 324, 46 L.Ed.2d at 319.

However, the logical entailment of the Miranda Court's language mandates that "the interrogation must cease" at least with respect to the same crime and the same interrogating officer for a substantial period of time." (Emphasis supplied)

Likewise, the Court in United States v. Jakakas, *supra*, noted:

"Furthermore, Michigan v. Mosley, *supra*, also seems to hold that a substantial period of time must be lapsed between an invocation of rights and a resumption of questioning and also possibly that the second interrogation be restricted to a crime that had not been a subject of the earlier interrogation." 423 F.Supp. at 569 (Emphasis supplied)

When the police officers in this case were transporting the Defendant to the jail on January 9, 1980, they had a brief discussion with him in the car, and he said "I think I want to talk to an attorney before I say anything else" (R-471). Nevertheless, the officers questioned the Defendant while he was being booked, and again in detail at 2:00 a.m. on the morning of January 10, 1980. (R-473). He did not have an opportunity to speak with an attorney at any time during the day of January 9 or in the early morning hours of January 10 prior to an interview.

During the first interview, which was conducted on January 10, 1980, the Defendant again advised the officers that he wished to speak to an attorney. On that occasion, he was reported to have said, "I'm kind of tired and I think I want to talk to my attorney, will you all come back tomorrow" (R-477). Admittedly, this statement could have been interpreted by the police officers as permission to come back the next day, but the point is that the interview wherein the statement was made should not have been conducted in the first place.

The Defendant's unequivocal statement to the police officers in the afternoon of January 9 that he wished to see an attorney before he made any further

statement should have caused the complete termination of all questioning. At the very least, it cannot be said upon this record, that the Defendant's "right to cut off questioning" was "scrupulously honored", Michigan v. Mosley, 423 U.S. at 104.

For these reasons, the Defendant contends that the statements he made to the police officers on January 10, 1980 should have been excluded from the evidence presented at his trial.

POINT FOUR

THE DEFENDANT'S FINAL STATEMENT
SHOULD HAVE BEEN EXCLUDED ON THE
GROUND THAT THE OFFICERS FAILED
TO ADVISE THE DEFENDANT'S COURT
APPOINTED ATTORNEY THAT THEY WERE
CONDUCTING AN INTERVIEW.

The final and most incriminating statement taken from the Defendant on January 10, 1980 was obtained only after the police deliberately avoided making any contact with his court-appointed attorney. The trial judge originally ruled that this statement was inadmissible on the ground that the officers failed to notify the attorney known to have been appointed to represent the Defendant prior to the time they began the final questioning session. (R-388,579,580), but later reversed that ruling. (R-411,412,432). The Defendant respectfully submits that the trial judge's original ruling was correct and that the statement should have been excluded from evidence.

In Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), the Court held that police officers may not take a statement from a post-indictment criminal defendant known to be represented by counsel, without informing his attorney. The Court in Escobedo v. Illinois, 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758 (1964) extended the right to counsel to pre-indictment questioning where the questions go beyond a general inquiry

of the Defendant and begin to focus on him as a suspect. These principles combined, form the rule that the officers must notify an attorney representing a pre-indictment suspect who is the focus of an investigation, that they are about to question his client.²

For example, in Clifton v. United States, 341 F.2d 649 (5th Cir. 1965), the Court held that a pre-indictment statement made by the defendant to agents who failed to inform his court-appointed lawyer that they were conducting questioning was inadmissible. The Court noted that the agents knew, or should have known, that the defendant was represented by counsel, and that there was no excuse for their failure to call him. Likewise, the Florida Courts have held that once the police officers know of the representation of a criminal defendant by a particular attorney, they must notify that attorney before they may begin questioning. See Williams v. State, 188 So.2d 320 (Fla. 2d DCA 1966), and compare State v. Craig, 237 So.2d 737 (Fla. 1970).

This is not such a case as Sanders v. State, 378 So.2d 880 (1st DCA 1980) relied upon by the Court below, where the officers were merely negligent in ascertaining the status of the Defendant's legal representation.³ Nor, is this such a case as Witt v. State, 342 So.2d 497 (Fla. 1977) where the defendant expressly indicated to the police that he intended to confess to the,

² At least one intermediate Appellate Court in this state has incorrectly assumed that the Massiah decision is categorically inapplicable to pre-indictment questioning. See Robinson v. State, 351 So.2d 1100 (Fla. 3d DCA 1977). That Court failed to consider the impact the Escobedo decision had upon the prior ruling of the Court in Massiah. Nor does the decision recognize that a deprivation of the Sixth Amendment right to counsel can, under certain factual situations, exist at any stage of the proceedings.

³ The Defendant also contends that the First District Court of Appeals in Sanders improvidently relied upon the decision of this Court in Stone v. State, 378 So.2d 765 (Fla. 1980). In the Stone case, this Court merely held that a request for an attorney for an unrelated civil matter does not require the cessation of questioning under Miranda.

grime in spite of the fact that he was represented by counsel.

In this case, the police officer went to conduct an interview of the Defendant on the afternoon of January 10, 1980, with full knowledge that the Public Defender's Office had been appointed earlier that morning at an advisory hearing (R-478) and that a representative of the Public Defender's Office had conferred at length with the Defendant around noon on January 10, 1980 just prior to their interview. The officers conceded that they made no effort whatsoever to contact anyone in the Public Defender's Office to advise them that they were conducting an interview with their client. (R-499,500). Certainly under these facts, it cannot be disputed that the interrogation "focused on the Defendant" as a suspect in the offense. Escobedo v. Illinois, supra.

The trial judge was correct in ordering the suppression of the Defendant's final statement to the police, and the reversal of that decision on the State's Motion for Rehearing was error.

POINT FIVE

THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THEY WERE NOT SHOWN TO HAVE BEEN MADE VOLUNTARILY.

The question of whether a statement made by the accused was voluntary can only be answered by reviewing all of the circumstances surrounding the making of the statement. Blackburn v. Alabama, 361 U.S. 199, 4 L.Ed.2d 242, 80 S.Ct. 274 (1960), Boulden v. Holman, 394 U.S. 478, 22 L.Ed.2d 433, 89 S.Ct. 1138 (1969).

One circumstance which renders a statement involuntary is psychological coercion. Townsend v. Sain, 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745 (1963), Blackburn v. Alabama, supra. When the interrogators exert improper influence

such as a false show of sympathy, or an implied promise however slight, psychological coercion has been found. Malloy v. Hogan, 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489 (1964). The Florida Courts have also recognized that emotional considerations as well as physical considerations have a bearing on voluntariness. For example in Breedlove v. State, 364 So.2d 495 (Fla. 4th DCA 1978) the Court ordered the suppression of the defendant's statement because she was crying and obviously upset at the time it was made, and because that created a doubt as to the question of voluntariness.

Another factor to be considered in determining the voluntariness of a statement is the nature of the detention, 14 Fla. Jur. 2d CRIMINAL LAW §141 (1980). The length and condition of incarceration, and the degree to which the defendant is isolated from others all have a bearing on the issue.

The circumstances surrounding the statements made by Robert Waterhouse were detailed at the Motion to Suppress hearing. (R-468-477). It appears that Waterhouse was booked on the afternoon of January 9, 1980. Sometime around two or three o'clock in the morning, the officers visited Waterhouse and again attempted to elicit statements from him. (R-473). They questioned him for several hours until finally Waterhouse asked them to leave because he was tired. (R-477).

Throughout that early morning interrogation Waterhouse demonstrated symptoms of emotional stress. Officer Murry testified that Waterhouse would often break down and cry. She said that they would terminate the interrogation while he cried, and resume it again when he stopped. (R-476). Officer Murry also testified that Waterhouse pleaded with them several times that he "just wanted to talk to them as people" and not as police officers. (R 476).

Later in the afternoon of January 10, 1980, after Waterhouse had spoken with his attorney, the same two officers again interrogated him. While Officer Murry was explaining his rights she told him that she really didn't know "if

what you are going to say can be used in court." (R 479). Officer Murry testified that during this interview, like the one in the early morning hours of that day, Waterhouse was upset and confused. (R-481). Also like the previous session, this interrogation lasted for several hours.

It is clear from the testimony of Officer Murry that Waterhouse was in a highly confused emotional state when he spoke with her. It is also clear that the officers intentionally exploited the prisoner's mental instability and took deliberate steps to compound it. First, they waited until the middle of the night to talk to him, knowing that he would be feeling particularly lonely and depressed at that time. Then, they pretended to be friendly and sympathetic and indicated that they only wanted to talk. For hours they interrogated him, stopping to let him cry, but starting back up whenever he quit crying. One who was not there can only imagine the mental anguish which Robert Waterhouse went through that night; being in prison, awake all night with no one to talk to but the police. Surely his emotional confusion was at least as bad as the defendant's in Breedlove, supra, where the Court said, "Appellant's emotional confusion raises serious doubts as to whether her statements were knowingly and intelligently made", Breedlove 364 So.2d at 497.

Officer Murry also testified that Waterhouse was upset and confused at the session which took place in the afternoon of that same day. (R-481). At that session, Officer Murry implied that statements made to her would not be used against him. This implied promise is the type of psychological trick which is barred by the Supreme Court's decision in Malloy, supra.

By looking at all the circumstances surrounding the statements made by the Defendant to the police officers, the voluntariness of those statements becomes dubious. The Defendant was left alone until two or three o'clock in the morning when he was approached by two apparently sympathetic and friendly officers. Throughout the night he was crying and showing other signs

of mental instability. The next day when his mental state had surely worsened from lack of sleep he was again approached by the officers. On this occasion, in addition to evincing false sympathy, they implied that the Defendant was free to talk to them without fear that his statements would be used against him in Court.

It is submitted that due to the psychological coercion, the implied promise, and the circumstances of the two a.m. interrogation, the statements made by Waterhouse to Officers Murry and Hitchcox were involuntary. Therefore the Motion to Suppress was improperly denied.

B

THE TRIAL

POINT SIX

THE EVIDENCE OF THE DEFENDANT'S ALLEGED POSSESSION OF MARIJUANA WAS IMPROPERLY ADMITTED BECAUSE IT DID NOT MEET THE RELEVANCY TEST REQUIRED BY THE FLORIDA EVIDENCE CODE AND THE WILLIAMS RULE.

Chapter 90.404(2)(a) of the Florida Evidence Code states that similar fact evidence of other crimes is admissible to prove a material fact in issue, such as proof of motive opportunity intent, plan, knowledge, identity or absence of mistake, but is inadmissible if relevant to prove bad character or propensity. This chapter is essentially a codification of the so called "Williams Rule".

The "Williams Rule" permits the introduction of evidence of "any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused..." (Emphasis supplied). Williams v. State, 110 So.2d 654 (Fla. 1959). In Williams, the Court attempted to lay to rest the question of when evidence of a collateral offense is admissible. Briefly,

the case holds that evidence of a similar act or offense may be used by the prosecution when it is relevant to demonstrate motive, intent, absence of mistake, common scheme, or identity. Id at 663. The matter of relevancy should be carefully and cautiously considered by the trial judge. Id at 663.

In the instant case, the trial judge permitted the prosecution to present evidence to the jury that marijuana had been found in Waterhouse's automobile almost a week after the crime had been committed. (R 1365). No argument was made that the evidence was relevant to prove a material fact in issue. The testimony regarding marijuana was offered and admitted solely for the purpose of corroboration. (R-1366).

A brief review of the record will demonstrate that the trial judge failed to cautiously scrutinize the relevancy of the evidence. Obviously, the fact that marijuana was found in the Defendant's car is not similar fact evidence. Equally obvious is the fact that this evidence has absolutely no bearing on the issue of whether or not the Defendant was connected with a murder that had taken place several days before. There was no allegation that the murderer was a marijuana user. Such an allegation would have been necessary to render the marijuana discovery relevant to show identity. Similarly, there is nothing in the case which would indicate that marijuana use would demonstrate motive, intent, absence of mistake or common scheme.

These are the types of issues the Court contemplated when it held that evidence of similar crimes may be used when relevant to a material fact in issue. Id at 663. The fact that the evidence in this case was admitted solely for the purpose of corroboration is proof that it was not used to demonstrate a material fact in issue. Therefore, the evidence does not fall within the "Williams Rule" exception to the evidence code. Id at 660, 663.

Allowing the jury to hear evidence that marijuana was found in the Defendant's car was highly prejudicial and inflammatory. The effect of the testimony was to attack the character of the Defendant even though his character had not been placed in issue; as demonstrated in the preceding paragraph, the evidence had no bearing on any material fact in issue. It is clear that the trial judge did not "carefully and cautiously" consider the relevancy of the evidence as required by Williams. Id at 663. On the contrary, he perfunctorily ruled that because the testimony had some corroborative value it was admissible.

For these reasons, the trial judge should have granted Defendant's Motion for a Mistrial.

POINT SEVEN

THE EVIDENCE OF AN ALLEGED HOMOSEXUAL
RAPE ATTEMPT WAS IMPROPERLY ADMITTED
BECAUSE IT DID NOT MEET THE RELEVANCY
TEST REQUIRED BY THE FLORIDA EVIDENCE
CODE AND THE WILLIAMS RULE.

Over timely objection by the defense, the trial judge admitted evidence of another wrongful act allegedly committed by the defendant.⁴ In overruling counsel's objection, the judge determined that the proffered testimony could be admitted without approaching it from a Williams Rule standpoint because the testimony provided background for the Defendant's statement against interest. (R-1753).⁵

⁴ The State offered testimony of one witness, a cell mate of the Defendant, that the Defendant had attempted anal rape on a third cell mate. The witness' testimony was uncorroborated and no charges were ever brought against the Defendant for the alleged offense.

⁵ According to the witness, after the alleged offense took place, Waterhouse said, "I wonder how he'd like a coke bottle up his ass like I gave her." It is conceded that this statement is an admission admissible under §90.803(18) Fla. Stat. (1976) as an exception to the hearsay rule. It is the testimony regarding the events that led up to the statement that was improperly heard.

Providing background for a statement against interest (or an admission) is not one of the exceptions to §90.404(1) Fla. Stat. (1976), nor is it the type of issue contemplated by the Williams Rule. The fact that certain evidence might aid the party offering the admission to lay a foundation does not make such evidence relevant to prove a material fact. Therefore, the trial judge erred in admitting evidence of another wrong for the purpose of providing background for the Defendant's admission.

As stated in Point Four of the Brief, §90.404(2)(a) Fla. Stat. (1976) is basically a codification of the Williams Rule. The Rule and the Code require evidence of other crimes to be relevant to prove a material fact in issue, Williams v. State, 100 So.2d 654 (Fla. 1959). Relevancy is the decisive factor. *Id* at 663. Since the evidence of the alleged crime in the instant case was totally irrelevant to prove the offense charged, its admission was erroneous.

The evidence which was elicited at trial tended to show that the Defendant committed or attempted to commit a homosexual rape while he was in prison. The prosecution argued that this act was relevant to prove that the Defendant had the motive or intent to commit the heterosexual attack with which he was charged.

In support of his contention, the prosecutor cited Alford v. State, 307 So. 2d 433 (Fla. 1975). In that case, the Court held that a frustrated attempt to have a homosexual liason just prior to the heterosexual rape was relevant to show that the defendant had a motive (i.e. an unfulfilled sexual urge) to commit the subsequent attack. *Id* at 438.

When viewed in this light, Alford has no bearing on the case at bar. In Alford, the other crime occurred just prior to the crime charged and in effect created the motive or state of mind which caused the defendant to commit the

subsequent crime. Therefore, it was logical for the Court to find that the previous crime was relevant to show motive even though the previous crime involved homosexuality and the crime charged did not.

In the instant case, however, the alleged other crime took place seven months after the crime with which the Defendant was charged. The Defendant was in prison at the time of the collateral offense but had been free at the time of the charged offense. The sole similarity of the two offenses was the presence of some kind of anal penetration. In Braen v. State, 302 So.2d 485 (Fla. 2d DCA 1974), the Court held that where the sole similarity in two instances was the copulation per anus the requisite similarity was not present. In that case, as in this one, the State sought to introduce evidence of a homosexual rape in a prosecution involving a heterosexual rape.

The evidence might show that the Defendant enjoyed anal sex with young men when he was in prison. However, that is not relevant to show that he had a motive to commit the crime with which he was charged. Gary Colvin, the victim's boyfriend, testified that he had attempted anal sex with the victim. That testimony might show that he enjoyed anal sex with women, but it certainly does not show that he had a motive to assault and murder someone. At least the testimony of Colvin showed that he liked to have anal sex with women. The evidence of the attempted jail house rape is not even relevant to show that about the Defendant Waterhouse.

The Williams Rule is not an open invitation to prosecutors to introduce any collateral offense which contains an element also found in the offense charged. The other offense must be factually similar, §90.404(2)(a) Fla. Stat. (1976), and must be relevant to prove a material issue in the case being tried. The implication that the Defendant desired anal sex with another man does not tend to prove that he had motive, opportunity, intent, or the state of

mind to commit the offense with which he was charged. Therefore, the evidence of the other offense was irrelevant and was improperly admitted.

C

THE PENALTY PHASE

POINT EIGHT

THE EVIDENCE DOES NOT SUPPORT A FINDING
THAT THE CAPITAL FELONY WAS COMMITTED BY
THE DEFENDANT FOR THE PURPOSE OF AVOIDING
OR PREVENTING A LAWFUL ARREST.

The trial judge found that the "murder in the present case was committed for the purpose of avoiding or preventing a lawful arrest in that the victim in the instant case was killed in order to eliminate her as a witness to the involuntary sexual battery, (R-408 1D). The finding is not supported by the evidence, and is therefore erroneous.

The record does contain testimony to the effect that the Defendant attempted to conceal some evidence relating to the murder after it was committed⁶, but that would not support the trial judge's conclusion for it is clear that §921.141(5)(e) Fla. Stat. (1977) requires the capital felony itself to be done for the purpose of avoiding arrest. There is no evidence in this record, direct or circumstantial, which would indicate that the murder was committed by the Defendant to avoid arrest. The conclusion that

⁶ For example, the luminol tests were introduced for the purpose of demonstrating that the Defendant cleaned blood off of some items of evidence, (R-1524-1544) and several witnesses said that the Defendant cleaned out the inside of his car. (R-1215,1239).

this aggravating circumstance exists cannot be reached in view of the test set forth in the decisions of this Court.

In Riley v. State, 366 So.2d 19 (Fla. 1979), the Court held that the aggravating factor, referring to the elimination of witnesses to avoid arrest, is not limited to the killing of police officers, but noted:

"... We caution, however, that the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement officer. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases..." (Emphasis supplied).

Likewise, in Menendez v. State, 368 So.2d 1278 (Fla. 1979), the Court held that the motive of avoiding arrest cannot be assumed from the facts but must be proven by the State.

The written Order in support of the death penalty concludes that the murder was committed to eliminate a witness, but there are no findings of fact in the Order to support the conclusion. Furthermore, the record itself fails to contain any such evidence. Clearly the State did not meet its burden of proving that the murder in this case was committed to eliminate a witness.

POINT NINE

THE EVIDENCE DOES NOT SUPPORT A FINDING
THAT THE CAPITAL FELONY WAS PARTICULARLY
HEINOUS, ATROCIOUS AND CRUEL

Subsection (h) of §921.141(5) Fla. Stat. (1977) relating to murders which are particularly heinous, atrocious, and cruel cannot be applied to this case for the State failed to prove beyond a reasonable doubt that the victim was conscious at the time the injuries described as "cruel" were inflicted.

In Halliwell v. State, 323 So.2d 557 (Fla. 1975), the Court held that the act of dismembering the victim with a saw and a fishing knife was not

particularly heinous, atrocious and cruel because the defendant had apparently already killed the victim at that point. If this section of the law is to apply to the acts which are "unnecessarily torturous to the victim", see Dixon v. State, 283 So.2d 1 (1973), then it would seem that the principle of Halliwell would apply to one who is unconscious as well as to one who is already dead.

Although the Medical Examiner testified that the injuries to the victim occurred prior to death, (R-1036,1056) she said that the victim could not have been conscious at the time her body was dragged into the water. (R-1060). It is obvious that the victim must have been both conscious and aware of what was going on during at least some of the beating, but that fact alone would not constitute evidence sufficient to support an application of this aggravating circumstance, see e.g. Swan v. State, 322 So.2d 485 (Fla. 1975).

For these reasons, the Defendant respectfully submits that the trial judge improperly applied this aggravating circumstance.

POINT TEN

THE TRIAL JUDGE ERRED IN BASING TWO AGGRAVATING CIRCUMSTANCES ON ONE PRIOR ACT OF THE DEFENDANT.

Two of the aggravating circumstances listed by the trial judge refer to the same prior conviction. The judge found that the Defendant was serving a term of imprisonment at the time of the present homicide and that he was previously convicted of a felony involving the use of threat of violence to the victim. These two circumstances are based on the same previous felony committed by the Defendant. Considering the same aspects of the Defendant's past to constitute two separate aggravating circumstances amounts to a doubling

up of aggravating factors. This Court has held that such doubling up of circumstances is improper. Provence v. State, 337 So.2d 783 (Fla. 1976).

It will not always be the case that a finding that §921.141(5)(a) Fla. Stat. (1977) and §921.141(5)(b) Fla. Stat. (1979) will amount to a cumulation of circumstances. For example, a person might be currently under a sentence of imprisonment for embezzlement and have previously been convicted of assault and battery. However, as applied to the Defendant Robert Waterhouse, one act constitutes two circumstances. Therefore, aggravating circumstances (A) and (B) of the trial judge's Order are cumulative in violation of Provence and both should not have been considered.

POINT ELEVEN

THE INVOLUNTARY SEXUAL BATTERY WAS AN
ESSENTIAL ELEMENT OF THE HOMICIDE AND AS
SUCH, IT COULD NOT CONSTITUTIONALLY BE
USED AS AN AGGRAVATING CIRCUMSTANCE.

The trial judge found as an aggravating circumstance that the murder was committed while the Defendant was engaged in the commission of an involuntary sexual battery. (R-408 11C) The Defendant contends that this was error as the involuntary sexual battery cannot be both an element of the offense under the felony murder rule, and at the same time be an aggravating circumstance sufficient to justify the imposition of the death penalty for the murder.

To hold that a felony offense can double as an element of proof of the murder under §782.04(1)(a) Fla. Stat. (1979) and as an aggravating factor of the murder under §921.141(5)(d) Fla. Stat. (1979) would violate several fundamental principles relating to the constitutional applicability of the death penalty. First, it is clear that the type of "aggravation" necessary to justify the imposition of the death penalty is something more than that which is

necessary to prove the crime itself. The very reason the Florida capital sentencing statute was upheld is that it requires proof of some aggravation which sets the case apart from the norm of capital felonies, see Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976), and State v. Dixon, 283 So.2d 1 (Fla. 1973). Secondly, the use of the enumerated felony in the penalty phase would provide a built in aggravating factor in every felony murder case and consequently a presumption⁷ that death is the appropriate penalty.

This Court held in State v. Pinder, 375 So.2d 836 (Fla. 1979), that a criminal defendant may not be convicted of both felony murder and the felony which served as the basis of the felony murder conviction. It follows then, that a given felony cannot constitute "aggravation" sufficient to justify the imposition of death if it also serves as the basis of the first degree felony murder conviction for which the death penalty is sought.

In Provence v. State, 337 So.2d 783 (Fla. 1976), the Court held that a murder committed while the defendant was engaged in the commission of a robbery could not also be aggravated on the basis that it was committed for pecuniary gain. Such a result would allow the same aspect of the defendant's crime to constitute two separate aggravating circumstances since the robbery is by its nature, committed for pecuniary gain. Since that decision, the Court has been careful to prevent the cumulation of aggravating circumstances based upon the same fact, see Meeks v. State, 339 So.2d 186 (Fla. 1976), Gibson v. State, 351 So.2d 948 (Fla. 1977), Jackson v. State, 359 So.2d 1190 (Fla. 1978), Riley v. State, 366 So.2d 19 (Fla. 1979), and Mikenas v. State, 367

⁷ The existence of at least one aggravating circumstance creates a presumption that the death penalty is the appropriate penalty. State v. Dixon, 283 So.2d 1 (Fla. 1973)

So.2d 606 (Fla. 1979). If aggravating factors cannot duplicate each other, it seems highly unlikely that they should be permitted to duplicate essential elements of the crime itself.

There can be no doubt about the fact that the involuntary sexual battery in this case was used both as an element of the murder conviction and as an aggravating circumstance supporting the death sentence imposed for that conviction. The trial judge in instructing the jury said:

"...Murder in the first degree is [an] .. unlawful killing of a human being when ... committed by a person engaged in the perpetration of ... involuntary sexual battery... (R-2198,2199)

"...The killing of a human being when committed by a person in the perpetration of or in the attempt to perpetrate...involuntary sexual batter...is murder in the first degree even though there is no premeditated design or intent to kill... (R-2200)

Following that instruction, the trial judge instructed the jury in detail as to the elements of involuntary sexual battery, as that offense may have applied under the felony murder rule. (R-2201,2202).

After the Defendant was convicted of first degree murder, the trial judge set forth the reasons for imposing the death penalty as follows:

"...The murder in the present case was committed by Robert Brian Waterhouse while Robert Brian Waterhouse was engaged in the commission of a Rape, also known as an Involuntary Sexual Battery, a life felony, upon the victim... (R-408 1C)

Of course, if the jury found the defendant guilty on the basis of the premeditated murder, then the trial judge would be free to use the involuntary sexual batter as an aggravating factor. One would have to indulge in pure speculation to reach that conclusion however, as there is no indication in the record as to which of the two theories advanced by the state, the jury accepted.

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The Defendant submits that the burden should be on the state to demonstrate that the aggravating circumstances are independent from the elements of the crime. If the prosecution proved beyond a reasonable doubt that the murder was committed while engaged in a rape, the jury may very well have used that factor to convict the Defendant under the Court's felony murder rule instruction. If that was the case, it was improper to use that factor as an aggravating circumstance as well.

In summary of this point, the sentence is illegal and in violation of the constitution because the aggravating factor upon which it depends was improperly applied.

CONCLUSION

The judgment of the trial court below should be reversed.

Respectfully submitted,




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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Hon. Jim Smith, Attorney General, The Capitol, Tallahassee, Florida 32301 by U. S. Mail this 6 day of May, 1981.



PHILIP J. PADOVANO

IN THE SUPREME COURT OF FLORIDA

ROBERT BRIAN WATERHOUSE,

Appellant,

vs.

CASE NO. 59,765

STATE OF FLORIDA,

Appellee.

APPELLANT'S REPLY BRIEF

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ARGUMENT

A

THE MOTIONS TO SUPPRESS

POINT ONE

THE STATEMENTS OF THE DEFENDANT
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EXCLUDED FROM EVIDENCE ON THE
GROUND THAT THEY WERE OBTAINED
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OR DETENTION.

The State, apparently conceding that the officers lacked probable cause for an arrest or investigatory detention, have relied entirely upon the argument that the defendant "voluntarily" appeared at the police station on January 7, 1980. This argument, however, is not supported by the record.

Counsel for the State has attempted to characterize the issue as one involving a "credibility question" the resolution of which was exclusively within the province of the trial court. While there are conflicts in the testimony to be sure, those differences do not affect the argument. We submit that even if the officers' testimony is taken as true, the Defendant's appearance at the police station for questioning was not shown to have been voluntary.

The police officers characterized the events in a different way, but their recollection of the facts is not substantially different from that of the Defendant's. Moreover, the critical testimony given by the Defendant, i.e., that he went to the police station only to obtain the return of his driver's license, was not rebutted in any way by the officers.

The Defendant testified that the only reason he followed the officers to

station was that they did not give him his driver's license back. (R-540). He said that he had asked Officer Stelljes to give him his license back at the scene of the stop and that the officer said "Well, you will have to go to the police station to get it back." (R-540). Detective Leake testified that he did not observe Detective Stelljes giving the license back (R-533), and Detective Stelljes who was himself called as a witness for the State was not even asked whether or not he gave it back. Thus, it could hardly be said that the Defendant's testimony on the critical question (why he went to the police station) was in "conflict" with the testimony of the officers.

Nor is the Defendant's testimony that the officers would not give him his car back once he arrived at the police station in conflict with the testimony of the officers. They admitted that they would not give the car back. (R-462).

In spite of the un rebutted testimony that the Defendant went to the police station only to get his driver's license back, and the police officers' admission of the fact that they refused to return the Defendant's vehicle, they insist upon characterizing the Defendant's appearance as voluntary. Such characterizations are of little use, however, as the Court must resolve such issues by analysis of the objective facts. It makes no difference whether the police decline to term the event as a formal arrest, Dunaway v. New York, 422 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), or whether they themselves consider the detention to be voluntary, State v. Frost, 374 So.2d 593 (Fla. 3rd DCA 1979). The important consideration involves the manner in which the detention reasonably appears to the Defendant.

In this case, the police officers not only took the Defendant's personal identification and his license to drive a car, but at some point, took the car itself. Here, no less than in Frost, *supra*, "it is totally unrealistic, and there-

fore, totally unacceptable...to suggest that [the defendant's] consent was an entirely voluntary and cooperative one when influenced by a real and effective restraint placed upon him by the officers." Id at 597.

For these reasons, the Defendant respectfully submits that the evidence obtained from him or from his vehicle subsequent to the station house questioning on January 7, 1980, should have been suppressed by the trial judge.

POINT TWO

THE TANGIBLE OBJECTS TAKEN FROM THE DEFENDANT'S CAR SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE ON THE GROUND THAT THE POLICE OFFICERS LACKED PROBABLE CAUSE TO SEIZE THE VEHICLE PRIOR TO THE TIME THEY OBTAINED A WARRANT TO SEARCH ITS CONTENTS.

In response to the arguments of the State on this point, the Defendant relies upon the arguments originally made in the Main Brief. (Appellant's Brief, p. 20-23).

POINT THREE

THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THE OFFICERS FAILED TO TERMINATE THEIR QUESTIONING AFTER THE DEFENDANT EXPRESSED HIS INTENTION TO REMAIN SILENT.

It is respectfully submitted that the decision of the Supreme Court in Edwards v. Arizona, ___ U.S. ___, 49 U.S.L.W. 4496 (May 18, 1981)¹ is controlling, and that it requires the suppression of all statements made by the Defendant to the police after he informed them of his desire to speak with an attorney.

The Court in Edwards squarely held that in the absence of an express waiver, the police may not re-interrogate a suspect who has once invoked his right to counsel. Mr Justice White speaking for a majority of the Court said:

"...and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights. We further hold that an accused...having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication..." 49 U.S.L.W. at 4498.

In this case, the police officers clearly initiated the re-interrogation which produced the statements sought to be suppressed, after the Defendant told them ~~he~~ wanted to speak with an attorney. The officers conceded that while the Defendant Waterhouse was being transported to the police station

¹ The State correctly pointed out that the Edwards decision was not cited in the Appellant's Main Brief. (Appellee's Brief, p. 9). That is because the decision was published 12 days after the Appellant's Brief was served.

following his arrest on January 9, 1980, he said to them, "I think I want to talk to an attorney before I say anything else." (R-471). Thus Edwards prohibits the use of statements made subsequent to that point, in the absence of an exoress waiver of counsel, or some showing that the Defendant himself initiated the interviews. Neither exception can be established by this record.

The decision of the Court in the Edwards case should come as no surprise to those legal commentators who have correctly read the Court's decision in Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed 2d 313 (1975). As we pointed out in the Main Brief, the Mosley case only permits a resumption of questioning provided the accused is given a fresh set of Miranda warnings, and provided that the questioning relates to some matter other than the investigation in which the accused originally invoked his right to counsel. It has been the law since Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966) that the police may not resume questioning in the same interrogation after the accused indicates his desire to speak with an attorney. The Court in Miranda said:

"...Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner at any time, prior to or during questioning, that he wishes to remain silent, the interrogation must cease..." 384 U.S. at 473, 474 (Emphasis supplied).

The Miranda and Mosely decisions foreclose any question about whether the more recent decision in Edwards can be applied to this case. The latter case does not announce any new principle of constitutional law; it merely clarifies existing law. Police officers have never had the right to resume questioning after a suspect invokes his right to counsel. Miranda, *supra*.

Predictably, the State has offered the argument that this case is factually distinguishable from Edwards. Carried to its logical extreme, all cases are factually distinguishable. There are many cases which are factually

distinguishable from Miranda, but that does not mean that the Miranda warnings are not required. The State contends that the Defendant's invocation of his right to counsel was equivocal. What he actually said, however, was "I think I want to talk to an attorney before I say anything else." (R-471)². If would be difficult indeed to imagine a more unequivocal expression of the Defendant's intention to speak with a lawyer before he gives any more information to the police.

Finally, the State contends that even if the statements were improperly allowed under Edwards, they were merely cumulative of other evidence³, and the error was therefore harmless. The statements were not cumulative, however, for all of the other evidence in the case was purely circumstantial. If the prosecutor had any direct evidence (other than the statements of the accused), he probably would not have had to resort to such exotic scientific evidence as "luminol" tests and "blood spatter stain" tests.

Counsel for the State has argued that the statements given on January 9th were merely cumulative of the "other valid" statements given by the Defendant on January 10th. (Appellee's Brief, p. 13). Somehow counsel assumed that the January 10th statement is not also inadmissible for the reasons expressed here. The State did not explain why that statement would not be affected by the argument made under this point, but so there will be no confusion, we contend that all statements made subsequent to the time the Defendant invoked his right to counsel are inadmissible under Edwards. The

² The State's Brief refers, out of context, to only a portion of this statement. (Appellee's Brief, p. 11).

³ Some of the evidence the State contends was cumulative, for example, the evidence relating to the anonymous tip, and the evidence relating to the license check, (Appellee's Brief, p. 13) was presented at the Motion to Suppress hearing; not the trial.

Defendant has another argument for exclusion of the January 10th statement (See Point Four) but that is not the only argument as to that statement; it is in addition to the argument made here.

On January 10th, the Defendant told the officers that he had a large sex drive and that when he had too much to drink, he had a tendency to become violent. (R-507,1821). He indicated that he liked sex any way he could get it, anal, oral, and vaginal, (R-1821) and that he frequently became frustrated to find out that his female companion was having her period. (R-1822, 1823). When the officers asked when these problems had last occurred he replied that it was the preceding Wednesday night (apparently referring to the night of the offense), (R-1823) and later said "Why do you think I have quit drinking since Wednesday night?" (R-1824). When the officers inquired further, he reportedly said "Well, nobody wants to go to jail and you do what you have to do to protect Bobby Waterhouse." (R-1825,1826). These statements provided incriminating evidence which was not duplicated by other evidence obtained by the police. Certainly it cannot be said that the error in admitting the statements was "harmless beyond a reasonable doubt."

Chapman v. California, 386 U.S. 18, 17 L.Ed 2d 705, 87 S.Ct. 824 (1967).

For these reasons, the Defendant respectfully submits that the introduction of the statements was error, and that the case should be reversed for a new trial.

POINT FOUR

THE DEFENDANT'S FINAL STATEMENT SHOULD
HAVE BEEN EXCLUDED ON THE GROUND THAT
THE OFFICERS FAILED TO ADVISE THE
DEFENDANT'S COURT APPOINTED ATTORNEY
THAT THEY WERE CONDUCTING AN INTERVIEW.

The State's argument on this point succeeds only in establishing that the rule in Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed 2d 246 (1964) does not per se require exclusion of pre-indictment statements taken from a defendant known to be represented by counsel. We do not contend that such statements are excludable in all cases; only that the facts and circumstances of this case require exclusion.

In this case, there was absolutely no excuse for the police officers to question the Defendant without advising his attorney that they were about to do so. They knew the Defendant did not waive his right to counsel, for he told them point blank on January 9th and again on January 10th that he wished to speak with an attorney. (R-471,477). They must have known that he did not wish to confess, for he repeatedly told them that as well. See e.g. (R-479). Finally, they knew that the Public Defender was appointed to represent the Defendant and that a representative of that office had conferred at length with him around noon on January 10th. (R-478,499,500). Nevertheless, they went to speak with the Defendant without making any effort whatsoever to tell the Public Defender, much less ask him if it was alright. (R-499,500). When they arrived at the Defendant's cell that afternoon, they found him to be "paranoid" and "very upset" (R-480,481), but being undeterred by any of that, they proceeded in the absence of his lawyer to elicit the most incriminating statement used in this case.

The trial judge originally ordered the exclusion of this final statement, (R-388,597,580) and his first reaction was correct. Surely the right of an accused to be represented by counsel would mean nothing at all if the police are permitted to knowingly and intentionally deal with the accused behind his lawyer's back.

There may be some situations, as the State points out, where absolute adherence to Massiah is not required prior to filing the indictment. This is not one of them. We are not dealing with a case where the officers were merely negligent in ascertaining the status of the defendant's legal representation, Sanders v. State, 378 So.2d 880 (Fla. 1st DCA 1980) or a case where the defendant expressly indicated to the police that he intended to confess to the crime in spite of the fact that he was represented by counsel, Witt v. State, 342 So.2d 497 (Fla. 1977).

For these reasons, and those expressed in the Main Brief, it is respectfully submitted that the trial judge was correct in ordering the suppression of the Defendant's final statement to the police, and that the reversal of the decision on the State's Motion for Rehearing was error.

POINT FIVE

THE DEFENDANT'S STATEMENTS SHOULD HAVE BEEN EXCLUDED ON THE GROUND THAT THEY WERE NOT SHOWN TO HAVE BEEN MADE VOLUNTARILY.

The State has made no substantive argument in response to the Defendant's contention that his statements were involuntary. Rather, counsel for the State relies entirely upon the procedural ground that voluntariness is not in issue because it was not properly preserved for appellate review. The State's argu-

ment, which purports to be based upon Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 594 (1977) is without merit, first because that decision does not establish any point relating to the preservation of state appellate issues, and secondly because the Defendant did object to the confession in the trial court.

The Supreme Court in Sykes was presented only with the question of whether the defendant was entitled to challenge his confession in a federal habeas corpus proceeding under 28 U.S.C. §2254. The Court was not making a rule, (nor could it have made a rule) respecting the manner in which alleged state trial errors are preserved for review in state appellate courts. In the Sykes case, the defendant objected to the introduction of his statement on the ground that the state had not yet shown the corpus delicti, but he made no objection at all to the statement itself. It was the lack of any objection and not the failure to object on a particular ground, that led the court to believe the defendant had not fairly presented his claim to the state court, and therefore was not entitled to federal habeas corpus review.

In this case, the Defendant challenged the statements in three separate written motions. A hearing was held in the lower court, in which a great deal of time was spent examining and cross examining witnesses about the Defendant's emotional state at the time the statements were made. The fact that the written motions do not specifically refer to voluntariness does not preclude consideration of the issue because all of the matters specifically raised, necessarily relate to the ultimate question of whether the statements were or were not voluntary. The trial judge evidently thought that the issue of voluntariness was fairly encompassed within the defense objection because he made an express finding of voluntariness. (R-580).

Counsel for the State has confused objections with arguments on objections. The failure to preserve an alleged error for review by failing to object to the judicial act alleged to be erroneous, is not at all the same as the failure to give a particular legal argument in support of the objection. The question of whether a given error has been preserved for review relates only to the question of whether the objection should have been sustained, not upon the particular legal analysis made of it during the trial. See generally 3 Fla. Jur 2d APPELLATE PRACTICE §92, 95 (1978).

The Appellee overlooks the fact that the ultimate responsibility of the Appellate Court is to determine (for whatever reason) whether the order under review is legally correct, Congregation Temple v. Aronson, 128 So.2d 585, (Fla 1961). The process of reasoning by which the trial court reached its conclusion is not regarded as the controlling factor in entering a reversal or affirmance. Hamelmann v. State, 113 So.2d 394 (Fla. 1st DCA 1969).

This Court in adopting the new appellate rules allowed for an even greater degree of flexibility in the appellate courts than that which was allowed by the common law, and previous editions of the rules. The Court not only dispensed with the requirement that the Appellant file assignments of error, but provided that such assignments of error are improper, Fla. R. App. P. 9.040(e). Moreover, the Appellate Courts were given the jurisdiction which may be necessary to a "complete determination" of the cause, Fla. R. App. P. 9.040(a), the power to disregard procedural errors which do not affect the substantial rights of the parties, Fla. R. App. P. 9.040(d), and the ability to provide a remedy not requested by the parties, Fla. R. App. P. 9.040(c).

In this case, an objection to the statements was made in the trial court. The trial court considered the objection at a lengthy pre-trial hearing and found, among other things, that the statements were voluntary. If there was

some procedural defect in the written motions filed by the Defendant's attorneys it is difficult to see how it affected the "substantial rights" of any of the parties.

Counsel for the State is plainly wrong in the assertion that the Defendant's trial counsel did not object to the trial court's ruling on voluntariness. The colloquy cited in the State's Brief is taken from the trial, and demonstrates no more than the fact that the defense attorneys recognized that they were bound by the trial court's ruling on voluntariness made earlier at the motion to suppress hearing. (Appellee's Brief, p. 21,22) (R-1813,1814). The remarks of the defense attorneys referred to in the State's Brief show that they respected the judge's ruling and that they considered it to be "res judicata"; they do not show that defense counsel agreed to the ruling or that they never objected to it in the first place.

As to the substantive argument on voluntariness, the Defendant relies upon the argument originally made in the Main Brief. For the reasons expressed there, and in this Reply Brief, the Defendant respectfully contends that the statements should have been excluded from evidence at trial on the ground that they were involuntary.

B
THE TRIAL

POINT SIX

THE EVIDENCE OF THE DEFENDANT'S ALLEGED
POSSESSION OF MARIJUANA WAS IMPROPERLY
ADMITTED BECAUSE IT DID NOT MEET THE
RELEVANCY TEST REQUIRED BY THE FLORIDA
EVIDENCE CODE AND THE WILLIAMS RULE.

The State's reliance upon Malloy v. State, 382 So.2d 1190 (Fla. 1979) is misplaced, first because that decision involved an incident which was part of a chain of chronological events leading to the offense charged, and secondly because the proof of the incident in that case did not establish all of the elements of a criminal offense.

In Malloy, where the Defendant was charged with first degree murder, the Court allowed testimony relating to his use of a rifle in the parking lot of a lounge earlier in the evening. Part of the reason for approving the use of the testimony was that the evidence relating to the use of the rifle did not in and of itself establish that the Defendant had committed a "separate crime", not referred to in the charge. The Court said: "...the circumstances of the lounge incident do not establish all the elements of a crime and, consequently the question of the admissibility of prior criminal acts is not present..." id 1192. In this case, technician Wilbur Ehlers was permitted to testify that he found ten baggies of marijuana in the glove compartment of the Defendant's car. (R-1365). Thus it appears in this case that all the elements of a separate crime, i.e. possession of marijuana, were established.

The second major distinction is that the Malloy case involved an incident which was part of the chain of events leading up to the murder, and this one did not. In the case below, the marijuana was found in the Defendant's car

almost one week after the murder had been committed. (R-1365). The evidence relating to the Defendant's possession of marijuana has no arguable bearing on the question of whether he committed the murder. It is not relevant to the offense, nor is it part of the sequence of events necessary to a logical presentation of the case.

Upon these arguments and those more fully developed in the Main Brief, the Defendant respectfully submits that it was error to allow testimony concerning the marijuana and that the trial judge should have granted the Defendant's Motion of Mistrial.

POINT SEVEN

THE EVIDENCE OF AN ALLEGED HOMOSEXUAL
RAPE ATTEMPT WAS IMPROPERLY ADMITTED
BECAUSE IT DID NOT MEET THE RELEVANCY
TEST REQUIRED BY THE FLORIDA EVIDENCE
CODE AND THE WILLIAMS RULE.

The State did not present any authority for the proposition that evidence of a prior criminal act is relevant and therefore admissible simply because it explains a pre-trial statement which is itself admissible as a statement against interest.

The introduction of the evidence of a homosexual rape attempt upon an inmate in the Pinellas County Jail for the sole purpose of explaining a statement the prosecutor wanted to offer as an admission against interest clearly does not fall within the "Williams Rule". We concede that evidence of prior criminal conduct is admissible as being relevant to the offense charged, if it tends to show motive, common scheme or plan, identity, or intent. We also concede that

evidence of the fact that the Defendant made a pre-trial statement against interest to a third party is admissible. There is no precedent, however, (and the Court should not make one) for the proposition that evidence of prior criminal conduct is admissible for the purpose of explaining pre-trial statements.⁴

If the statement is admissible on the ground that it is truly an admission against interest, it will be sufficiently inculpatory in and of itself to be of probative value, without the use of secondary evidence to explain what the declarant meant. Even if the trial judge was correct in allowing the statement as an admission against interest (R-871) that does not establish the propriety of allowing the witness to testify as to the details of the alleged homosexual rape. That testimony if admissible at all, depends upon whether it is relevant to the offense under the Williams Rule.

For these reasons, and those more fully expressed in the Main Brief, the Defendant contends that it was error for the trial judge to allow testimony relating to the alleged jailhouse rape.

⁴ In Ruffin v. State, ___ So.2d ___, 1981 F.L.W. 228 (Case No. 55,684, March 26, 1981), cited by the State, the challenged evidence was admitted because it proved identity, explained where the murder weapon was and how the Defendant was apprehended. The Court did not rule that other criminal acts were admissible to explain the Defendant's statements.

THE PENALTY PHASE

POINT EIGHT

THE EVIDENCE DOES NOT SUPPORT A FINDING
THAT THE CAPITAL FELONY WAS COMMITTED
BY THE DEFENDANT FOR THE PURPOSE OF
AVOIDING OR PREVENTING A LAWFUL ARREST.

The State contends that the record is sufficient to support a finding that the murder was committed to avoid arrest or detection and therefore the trial judge correctly applied the aggravating factor found in §921.141(5)(e) Fla. Stat. (1977). The error in this position is that the only evidence which could reasonably be construed as an attempt to avoid arrest or detection, relates to actions of the Defendant subsequent to the murder.

We conceded in the Main Brief that the record contains some evidence that the Defendant attempted to conceal some evidence of the murder after it was committed. (Appellant's Brief, p. 36) However, §921.141(5)(e) Fla. Stat. (1977) requires the capital felony itself to be done for the purpose of avoiding arrest. Evidence of a subsequent cover up or concealment might be relevant on the issue of guilt, but the only evidence which will support the application of the §(5)(e) aggravating factor is evidence that the murder itself was committed to avoid arrest or detection. This section by its very terms applies to a situation where one is killed for the purpose of eliminating a witness to another crime.

For these reasons, we submit that the §(5)(e) aggravating circumstance was erroneously applied.

POINT NINE

THE EVIDENCE DOES NOT SUPPORT A FINDING
THAT THE CAPITAL FELONY WAS PARTICULARLY
HEINOUS, ATROCIOUS AND CRUEL.

In response to the arguments of the State on this point, the Defendant
relies upon the arguments originally made in the Main Brief. (Appellant's
Brief, p. 37-38).

POINT TEN

THE TRIAL JUDGE ERRED IN BASING TWO
AGGRAVATING CIRCUMSTANCES ON ONE
PRIOR ACT OF THE DEFENDANT.

In response to the arguments of the State on this point, the Defendant
relies upon the arguments originally made in the Main Brief. (Appellant's
Brief, p. 38-39).

POINT ELEVEN

THE INVOLUNTARY SEXUAL BATTERY WAS AN
ESSENTIAL ELEMENT OF THE HOMICIDE AND AS
SUCH, IT COULD NOT CONSTITUTIONALLY BE
USED AS AN AGGRAVATING CIRCUMSTANCE.

The State's argument on this point succeeds only in establishing that
there is no authority for the Defendant's position; not that it is wrong.

The Florida Capital Sentencing Statute is relatively new. Naturally there will be many arguments in the interpretation and application of the law which depend not upon blind adherence to precedent but rather upon logic and careful analysis of legal theory.

Counsel for the State has failed to point to any fallacy in the Defendant's logic. Surely the argument should not be rejected for the sole reason that it is not supported by any precedent. Perhaps it was not raised before.

For these reasons, it is respectfully submitted that the argument made in the Main Brief should be accepted by the Court.

CONCLUSION

The judgment of the trial court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Peggy Quince, Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602 by U. S. Mail this _____ day of July, 1981.

PHILIP J. PADOVANO